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Supreme Court, U. S.
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No. 79-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

DONALD J. LOOK, *Petitioner,*

v.

COMMONWEALTH OF MASSACHUSETTS, *Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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Petitioner, Donald J. Look, prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

### OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is not yet reported; it is set forth as Appendix C, *infra* pp. 23a-41a. The rulings of the Superior Court of Massachusetts are not reported; its "Rulings and Order on Defendant's Motion to Dismiss for Lack of Speedy Trial" is set forth as Appendix A, *infra* pp. 1a-10a, and its "Decision on Defendant's Motions to Suppress I and III" is set forth as Appendix B, *infra* pp. 11a-22a.

## JURISDICTION

The judgment of the court below was entered on March 4, 1980. (Appendix D, *infra* p. 43a.) On March 11, 1980, the Supreme Judicial Court of Massachusetts denied a timely petition for rehearing. (Appendix E, *infra* p. 45a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

1. Whether the Commonwealth's unexplained delay of more than four and one-half years in bringing petitioner to trial, which delay was presumptively prejudicial and also caused actual prejudice to petitioner, deprived him of his right to a speedy trial pursuant to the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. A closely related question is whether the shotgun should have been admitted into evidence when, because of lapse of time and the failure of the Commonwealth to preserve the condition of the shotgun at the time of the shooting, its usefulness to the defense was destroyed.

3. Whether the warrantless electronic interception by the Wareham police officers of petitioner's conversation with Walter Pierce (who was Police Chief of Rochester, petitioner's home town) without the knowledge or consent of either petitioner or Mr. Pierce, was an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States, and in addition violated 18 U.S.C. §§ 2510 *et seq.*, and thereby required exclusion from evidence of the fruits of that surveillance.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The United States Constitution, Amendment VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The relevant statutory provisions, 18 U.S.C. §§ 2510 *et seq.*, are reproduced in Appendix F, *infra* pp. 47a-48a.

## STATEMENT

On January 28, 1974, shortly before 11:00 p.m., petitioner's then wife was shot at her and petitioner's home in Rochester, Massachusetts. (Tr. Vol. 3, pp. 15-16.) Petitioner does not contest that he inflicted the wound, but has consistently maintained that the shooting was an accident which occurred while he was cleaning his

hunting shotgun. (Tr. Vol. 3, pp. 36, 47, 70; Vol. 6, p. 90.)[1]

Immediately after the shooting, petitioner summoned an ambulance which took his wife to a nearby hospital. (Tr. Vol. 3, pp. 15-16, 36, 42.) While waiting at the hospital, petitioner was accompanied by the Rochester Police Chief, Walter Pierce. (Tr. Vol. 3, pp. 44-45.) Other police officers also were at the hospital, and petitioner was at this point informed of his rights under *Miranda* v. *Arizona,* 384 U.S. 436. (Tr. Vol. 3, p. 45.)

Petitioner's wife died at approximately 11:30 p.m., and petitioner was taken to the Wareham police station. (R. 37; Tr. Vol. 1, pp. 39-40.) Petitioner and Mr. Pierce, the Rochester Police Chief, spent the next approximately two and three-quarters hours in a separate room—the interrogation room—at the police station, awaiting the arrival of State Police detectives. (R. 37; Tr. Vol. 1, p. 40, 51, 57.) During this wait, petitioner and Mr. Pierce were alone. (R. 37; Tr. Vol. 1, p. 40.) Petitioner recounted to Mr. Pierce the events preceding the shooting. (Tr. Vol. 1, p. 41.) The two men were long-time acquaintances (Tr. Vol. 3, p. 69), and during their conversation petitioner informed Mr. Pierce that he and his wife had argued earlier in the evening. (R. 37; Tr. Vol. 1, pp. 42-43.) Mr. Pierce advised petitioner not to inform the State Police of the argument. (Tr. Vol. 1, pp. 89, 96, 106.)

This conversation was secretly intercepted through a listening device connected to the police station's

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[1] References to the transcript of the pre-trial motions and the trial are indicated by "Tr.". References to the summary Record in the Supreme Judicial Court are indicated by "R.".

front desk, where it was heard by three police officers. (Tr. Vol. 1, pp. 88-89, 96-97, 106.) Neither petitioner nor Mr. Pierce knew of or consented to the surveillance. (R. 38; Tr. Vol. 1, p. 46.) The listening device was operated from the police station's front desk, and Mr. Pierce, who did not work out of the Wareham police station, did not know that the device was present. (R. 37-38; Tr. Vol. 1, pp. 46, 97.)

When the State Police detectives arrived at the Wareham police station, the officers who had overheard the conversation immediately informed them about it. (R. 38; Tr. Vol. 1, pp. 59-60.) The State Police officers then proceeded to interrogate petitioner for the next one and one-half to two hours. (R. 39, Tr. Vol. 1, p. 60.) They questioned petitioner about the argument with his wife. (Tr. Vol. 1, pp. 61, 119.) Some of the responses made by petitioner during this interrogation were developed into written notes by one of the officers. (Tr. Vol. 1, p. 115.) By the time of the trial, the State Police officer who had prepared the written notes during the interrogation was unable to recall many significant details of the questioning. (Tr. Vol. 1, pp. 115-23, 127-28.) Although the officer recalled having made use of his knowledge of petitioner's prior conversation with Mr. Pierce, he was unable to recreate the extent to which he had done so. (Tr. Vol. 1, pp. 115-20.)

At the conclusion of this interrogation, on January 29, 1974, petitioner was booked on the charge of murder. (Tr. Vol. 1, p. 141.) Four months later, on May 29, 1974, petitioner was indicted after a probable cause hearing. (R. 1-2.) On March 17, 1975, petitioner's motion to suppress certain statements of the victim was granted, and on March 26, 1975, the Commonwealth applied to the Supreme Judicial Court for an inter-

locutory appeal from that suppression order. (R. 10.) On November 22, 1975, this Application for Appeal was dismissed for lack of prosecution. (R. 10.)

Nearly two years then elapsed before the Commonwealth took any further action in the case. On November 2, 1977, the Commonwealth moved to vacate the dismissal of this interlocutory appeal. (R. 10.) That motion was denied on November 22, 1977. (R. 10.) Four months later, on March 27, 1978, more than four years after the decedent's death, the Commonwealth filed a request for a trial assignment. (R. 10.)

Petitioner responded on April 5, 1978, with a motion to dismiss on the grounds that the Commonwealth's delay in bringing him to trial was unreasonable and unexcused, and claimed actual prejudice from the delay in four specific respects: (1) one of petitioner's witnesses, Ms. Betty Roy, who was to have provided key testimony as to the harmonious relationship between petitioner and his wife, had disappeared during the delay and thus was unavailable to testify on petitioner's behalf; (2) two of the Commonwealth's experts had seriously diminished recollections of the condition of the weapon, particularly as to whether there was oil on the outside of the weapon or whether it was in need of cleaning, factors on which their testimony could have provided critical corroboration; (3) petitioner himself had diminished memory of the incident; and (4) petitioner experienced great anxiety and concern during the four-year pre-trial period. The Commonwealth offered no justification for the delay. The Superior Court denied petitioner's motion. (Appendix A, *infra* pp. 1a-10a.)

Petitioner's trial commenced on October 19, 1978. (R. 58.) Just prior to that date, petitioner filed his

"Motion to Suppress (III)," seeking suppression of "the content and evidence derived therefrom" of his illegally intercepted conversation with Mr. Pierce. (R. 28.) The Superior Court denied this motion (Appendix B, *infra* pp. 11a-22a), and evidence obtained as a product of the interception was introduced at trial. (Tr. Vol. 3, pp. 110, 131, 164; Vol. 4, p. 37.) The Commonwealth also was permitted to introduce the shotgun into evidence, notwithstanding petitioner's objection that the Commonwealth's failure to preserve the condition of the shotgun at the time of the shooting destroyed its usefulness to his defense and made it inadmissible.

Petitioner was convicted of second degree murder on November 1, 1978. (R. 58.) He thereafter filed a timely appeal to the Supreme Judicial Court of Massachusetts, assigning as errors, *inter alia,* the denial of his motion to dismiss for lack of a speedy trial, and the denial of his motion to suppress evidence obtained as the fruit of the illegal electronic surveillance. (R. 52-53, 58.)

The Supreme Judicial Court affirmed petitioner's conviction. On the Sixth Amendment speedy trial issue, the court acknowledged that the inordinate delay and the Commonwealth's utter lack of explanation therefor weighed in petitioner's favor. The court, however, concluded that petitioner's claims of prejudice were insufficient to satisfy his burden of proving actual prejudice and felt that petitioner should have asserted his speedy trial right earlier than he did. (Appendix C, *infra* pp. 29a-33a.) The court also approved the denial of petitioner's motion to suppress on the ground that the interception of petitioner's statements to Mr. Pierce did not violate federal law. The court reasoned that petitioner had no "expectation of privacy" during

that conversation, so that his statements were not "oral communications" within the meaning of 18 U.S.C. § 2510. (Appendix C, *infra* p. 40a.)

## REASONS FOR GRANTING THE WRIT

### 1. Denial of a Speedy Trial

The decision of the Supreme Judicial Court of Massachusetts on petitioner's Sixth Amendment speedy trial claim is contrary to several decisions of this Court.

(a) The failure of the court below to count the four-month period between petitioner's arrest and indictment as pertinent to the claim is in direct conflict with this Court's decision in *Dillingham* v. *United States,* 423 U.S. 64, and is alone ground for summary reversal, as in the *Dillingham* case itself.

The court below, in its opinion, said "In the present case the right to a speedy trial attached at the time Look was indicted, since he was not in custody prior thereto. *United States* v. *Marion,* 404 U.S. 307, 320-321 (1971)." (Appendix C, *infra* p. 27a.) That determination is directly contrary to this Court's holding in *Dillingham,* where the Court held that post-arrest, pre-indictment delay must be counted in assessing a speedy trial claim,[2] and ruled that *Marion's* apparent exclusion of the pre-indictment period is applicable only where defendant's arrest has not preceded his indictment. *Dillingham,* as here, involved a defendant who was free on bond during the post-arrest, pre-indictment period. *See United States* v. *Palmer,* 502 F.2d 1233,

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[2] The trial court found "that the defendant was arrested at the time that handcuffs were placed upon him in the emergency room." (Appendix B, *infra* p. 16a; R. 40.) This would have been early in the morning of January 29, 1974.

1234, 1237 (5th Cir. 1974). Thus *Dillingham* is directly in point and requires reversal of the decision below.[3]

(b) But reversal and remand because of *Dillingham* is not enough. This case also presents serious questions, still unsettled, with respect to application of the test enunciated by this Court in *Barker* v. *Wingo*, 407 U.S. 514, for determining whether a defendant has been deprived of his Sixth Amendment right to a speedy trial. These questions involve the standards by which the prejudice to a defendant from inordinate and unexcused delay is to be measured, on which state and federal courts should have more guidance.

In the present case, the Supreme Judicial Court held that "the defendant bears the burden of showing prejudicial delay sufficient to warrant dismissal of the indictment against him." (Appendix C, *infra* p. 27a.) Moreover, it made that burden extremely onerous. The court recognized no presumption that the delay was at all prejudicial. Instead the court rejected petitioner's claims of prejudice on the ground that they did not prove, to a high degree of certainty, that the delay had in fact caused prejudice.

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[3] In *Dillingham*, the pre-indictment delay (22 months) was longer than that involved here. But the post-indictment delay there (12 months) was much less, and the aggregate delay there (34 months) was nearly two years (22 months) less than that in this case.

On remand, the conviction involved in the *Dillingham* case was affirmed. *United States* v. *Palmer*, 537 F.2d 1287 (5th Cir. 1976), *cert. denied*, 434 U.S. 1018 (1978). But the aggregate delay there of 34 months serves to distinguish the Fifth Circuit's decision from this case, where the aggregate delay was more than 56 months, including more than four years after indictment.

However, this Court has stated that an unreasonable delay is "presumptively prejudicial," *Barker* v. *Wingo,* 407 U.S. at 530, and that "an affirmative demonstration of prejudice [is not] necessary to prove a denial of the constitutional right to a speedy trial," *Moore* v. *Arizona,* 414 U.S. 25, 26. The approach of the Supreme Judicial Court represents a marked departure from the *Barker* v. *Wingo* test. It affords significantly less protection for the fundamental constitutional right to a speedy trial than this Court has deemed necessary.

In *Barker* v. *Wingo* this Court established a balancing test for determining whether a defendant's right to a speedy trial has been violated. *Barker* identified four factors to be weighed: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530. In spelling out these factors, the Court did not intend a mechanical approach. Rather, the Court recognized that "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case," 407 U.S. at 522, and that "courts still must engage in a difficult and sensitive balancing process." 407 U.S. at 533.

Such a clear explication of factors bearing on a legal determination always carries the danger that mechanical application will be substituted for careful analysis. Unfortunately, the opinion below demonstrates this danger. The Supreme Judicial Court, moving factor by factor in its reasoning, erroneously underestimated the importance of the length of the delay in this case. The court considered the length of the delay for only one purpose: determining whether, in the word it used, the delay was long enough to "trigger" further inquiry. Having decided that it was, the court then moved on

to consider "the other three factors delineated in *Barker.*" (Appendix C, *infra* p. 27a.) As a result, in considering the factor of prejudice to the petitioner from the delay, the court failed to consider the bearing of the length of the delay on such prejudice. The court held petitioner to the same showing of actual prejudice it would have required had the delay been one year rather than well over four. (*See* Appendix C, *infra* pp. 30a-33a.)

This Court's decisions do not contemplate such an approach, and reason makes clear that such an approach is improper. To be sure, *Barker* v. *Wingo* stated that, "[t]he length of the delay is to some extent a triggering mechanism." 407 U.S. at 530. *Barker* by no means suggested, however, that triggering further inquiry is the only role of the length-of-delay factor.[4] It could not be. The length of the delay is inextricably related to the degree of prejudice to the defendant. *See Dickey* v. *Florida,* 398 U.S. 30, 48 n.12 (Brennan, J., concurring). *Barker* v. *Wingo* recognized that delay at some point becomes "presumptively prejudicial," because the probability of prejudice increases as the delay lengthens. The effect of delay should not stop once it reaches the threshold level. As the delay lengthens beyond the threshold that triggers the *Barker* inquiry the probability of prejudice continues to grow.

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[4] In *United States* v. *Herman,* 576 F.2d 1139, 1145 (5th Cir. 1978), the Fifth Circuit, per Judge Wisdom, explained that under *Barker* v. *Wingo* "[t]he first factor, the length of the delay, serves two roles. First, it serves a threshold role: there must be a delay long enough to be 'presumptively prejudicial'. . . . Second, we must weigh the length of this delay along with the other factors we consider."

A delay of four and one-half years certainly is more likely to be prejudicial than a delay of only one year.[5]

Not only does the likelihood of prejudice to the defendant increase as the delay lengthens, but the defendant's ability to show prejudice diminishes. In his concurring opinion in *Dickey* v. *Florida,* Mr. Justice Brennan observed that even where prejudice has occurred, it may be virtually impossible to prove. He wrote,

> [C]oncrete evidence of prejudice is often not at hand. Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses.

398 U.S. at 53. It is reasonable to expect that the longer the period of delay, the less likely it will be that the defendant will be able to marshall concrete evidence of prejudice. Evidence regarding the role of particular witnesses or documents that have become unavailable may itself have become unavailable, or have been rendered less forceful by the passage of time.

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[5] *Barker* cited Judge Frankel's "excellent" opinion in *United States* v. *Mann,* 291 F. Supp. 268 (S.D.N.Y. 1968), as "an example of how the speedy trial issue should be approached." 407 U.S. at 533 n.36. In that case, Judge Frankel emphasized the "weighty presumption of prejudice" that arises from a long delay:

> Where delay is as long and as groundless as that revealed here [9½ years], prejudice may fairly be presumed simply because everyone knows that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing months and years.

291 F. Supp. at 271, 273 (citations omitted).

The burden of proof as to prejudice and the standards by which prejudice is to be assessed were among the principal areas of uncertainty under the speedy trial guarantee that Mr. Justice Brennan discussed in his *Dickey* opinion. He noted the confusion in the lower federal courts:

> The courts below . . . are divided in their conclusions regarding prejudice. One court has stated that "we think that a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment." *United States* v. *Lustman,* 258 F.2d 475, 477-478 (C.A. 2d Cir. 1958). Some have held that prejudice may be assumed after lengthy delays, *e.g., Hedgepeth* v. *United States,* 124 U.S. App. D.C. 291, 294 and n. 3, 364 F.2d 684, 687 and n. 3 (1966). Others have insisted that its existence be shown by the defendant, *e.g., United States* v. *Jackson,* 369 F.2d 936, 939 (C.A. 4th Cir. 1966), though some courts have shifted the burden of proof to the government after long delay, *e.g., Williams* v. *United States,* 102 U.S. App. D.C. 51, 53-54, 250 F.2d 19, 21-22 (1957).

398 U.S. at 52-53. Mr. Justice Brennan proposed that the appropriate approach might be to vary the burden on the defendant with the length of the delay. The defendant would have the burden to show actual prejudice unless the delay was so long as to give rise to a "probability of substantial prejudice"; if the delay were long enough to create that inference, then "prejudice would cease to be an issue, unless the government wished to argue harmless error." 398 U.S. at 55.

Although *Barker* v. *Wingo* resolved many of the questions regarding the speedy trial right, it did not settle this one. The Court's recognition that unreasonable delay is "presumptively prejudicial" indicates

agreement with Mr. Justice Brennan's basic premise, but the Court did not develop the "generalized standards" contemplated by Justice Brennan, 398 U.S. at 55, or indicate how the presumption of prejudice relates to the burden of proof on the prejudice question. The lower federal courts still have not developed a clear and consistent rule in this regard. *Compare Prince* v. *Alabama,* 507 F.2d 693, 707 (5th Cir.), *cert. denied,* 423 U.S. 876 (1975), *and United States* v. *Dyson,* 469 F.2d 735, 741 (5th Cir. 1972), *with United States* v. *Edwards,* 577 F.2d 883, 889-91 (5th Cir.), *cert. denied,* 439 U.S. 968 (1978), *United States* v. *Frazier,* 584 F.2d 790, 792 (6th Cir. 1978), *and United States ex rel. Little* v. *Twomey,* 477 F.2d 767, 771-73 (7th Cir.), *cert. denied,* 414 U.S. 846 (1973).

To afford petitioner relief in the instant case, however, this Court would not have to fashion a rule of shifting burden of proof or alter the flexible balancing approach of *Barker* v. *Wingo.* The Court could simply hold that the court below erred in failing to account for the length of delay in evaluating the prejudice to petitioner. The four and one-half year unexplained delay in this case is much longer than the delays involved in all but a small number of the many speedy trial claims decided by federal trial courts since *Barker* v. *Wingo.* We contend that it was an abuse of discretion and a misapplication of *Barker* v. *Wingo* for the Massachusetts court mechanically to impose on petitioner the same high burden of proving prejudice that it might permissibly apply in a case involving a much shorter delay.

It must be emphasized that petitioner is not contending in this case that the extraordinary length of the delay makes identification of particular prejudicial

effects unnecessary. Petitioner does not rely upon merely a generalized claim of prejudice, but rather has identified several specific ways in which the delay seriously impaired his defense. The delay caused loss of the key defense witness on the primary issue of motive, as well as the admitted loss of memory by several of the Commonwealth's witnesses as to particular facts that would have corroborated petitioner's defense. Petitioner's position is that given the prejudice that reasonably must be presumed to result from a four and one-half year delay, and the difficulty of marshalling concrete evidence of prejudice at such a late date, his specific allegations were sufficient to show a substantial degree of prejudice, which should weigh heavily in favor of his speedy trial claim.[6]

Since there were no eye-witnesses to the events in this case, the whole case turned on motive. In that situation, the effect of delay is especially great. Proof of motive was necessarily by circumstantial evidence —hints of intent inferred from bits of conversation

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[6] The court below also gave inadequate weight to the prejudice to petitioner by reason of his "anxiety and concern" while awaiting trial, *Barker* v. *Wingo, supra,* 407 U.S. at 532, dismissing it as a "weak claim." (Appendix C, *infra* p. 32a-33a.) That conclusion is contrary to this Court's recognition that

> [i]nordinate delay . . . may 'seriously intefere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends' . . . [and that] . . . [t]hese factors . . . are inevitably present in every case to some extent. . . .

*Moore* v. *Arizona, supra,* 414 U.S. at 27; *Barker* v. *Wingo, supra,* 407 U.S. at 537 (concurring opinion). *See also* 407 U.S. at 532 n.33, 533. Since the anxiety and concern of the defendant is prejudicial in every case of pre-trial delay, certainly it cannot be regarded as a "weak claim" where the delay is as long as it was in this case, over four and one-half years.

and the like. On such a matter, small details can be crucial, and these are dimmed and lost by lapse of time. The conclusion below that the petitioner had suffered no prejudice was unreasonable and inconsistent with *Barker* v. *Wingo*. As the Court said in that case, the "process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." 407 U.S. at 533.

(c) The decision below is also in conflict with speedy trial decisions of federal courts of appeals. In *United States* v. *Dyson, supra,* 469 F.2d at 741, and *Murray* v. *Wainwright,* 450 F.2d 465, 471 (5th Cir. 1971), the Fifth Circuit stated,

> Where the delay is not only excessive but the result of unexcused inaction or misconduct by the Government, it is prima facie prejudicial . . . . The burden then shifts to the Government which must demonstrate that defendant has not been prejudiced by the delay.

*See also Prince* v. *Alabama, supra,* 507 F.2d at 707. Similarly, the Ninth Circuit in *Arnold* v. *McCarthy,* 566 F.2d 1377, 1382-83 (1978), has indicated that a delay of prosecution may be "so extreme that it requires the implication of prejudice by itself." The decision of the Massachusetts court in the case at bar, by attaching no weight to the length of the extraordinary four and one-half year unexplained and unexcused delay in evaluating petitioner's claims of prejudice and by holding petitioner's claims of prejudice to a high evidentiary standard, exercised its discretion in a manner inconsistent with these federal principles.

(d) A closely related question is presented with respect to the admission of the shotgun into evidence.

Even if the Commonwealth's delay was not such as to require dismissal, an intermediate remedy was available. The shotgun should not have been admitted into evidence in view of the clear prejudice to petitioner resulting from the delay. Petitioner's defense was that the shooting was an accident that occurred while he was cleaning his shotgun. Because of the delay and the Commonwealth's negligence during the delay, he was deprived of crucial evidence in support of this defense. As a result of the delay, several of the Commonwealth's witnesses including one of the Commonwealth's experts who had examined the shotgun were unable, due to failed memories, to testify as to matters such as the presence of oil on the shotgun, the presence of newspapers and oily rags on the table where the shotgun was found after the shooting, or the need of the shotgun for cleaning. Further, the Commonwealth's loss of custody and possession of the shotgun for approximately four years created serious questions as to whether its condition at trial was the same as that on the night of the shooting.

Because the delay and the Commonwealth's negligence significantly prejudiced petitioner with respect to the shotgun, the Commonwealth should not have been permitted to introduce it into evidence. Consistent with the principals of *Barker* v. *Wingo,* the Commonwealth should not derive benefit from an item of evidence after the usefulness of that very item of evidence to petitioner's defense was destroyed or impaired by loss of memory and changed condition due to the lapse of time.

**2. Illegal Electronic Surveillance**

The Supreme Judicial Court held that the fruits of the police officers' warrantless electronic monitoring of petitioner's separate conversation with Mr. Pierce —which as far as petitioner and Mr. Pierce knew was private [7]—did not have to be excluded from evidence under 18 U.S.C. § 2515. The basis for that holding was the state court's view that petitioner's statements to Mr. Pierce were not "oral communications" within the meaning of 18 U.S.C. § 2510(2), because petitioner did not have a justified expectation of privacy in the course of that conversation.[8] The court did not explain the basis for that conclusion, except to say that "a person who is talking to a police officer after being told that anything he says may be used against him in court, cannot justifiably claim to have an expectation of privacy as to any statements he makes." (Appendix C, *infra* p. 40a.)[9]

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[7] The trial judge found: "Neither Pierce nor Look had any knowledge that their conversation was being transmitted over the intercom, nor did they in any fashion consent thereto." (Appendix B, *infra* pp. 13a-14a; R. 38.)

[8] Under 18 U.S.C. § 2510(2), "oral communication" is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." Courts of Appeals have interpreted this expectation in the same terms as the expectation of privacy relevant to Fourth Amendment protection. *See United States* v. *Duncan*, 598 F.2d 839, 851 n.9 (4th Cir.), *cert. denied*, 444 U.S. —— (1979); *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1206 (2d Cir.), *cert. denied*, 415 U.S. 984 (1973).

[9] The court cited two cases for this proposition: *United States* v. *Duncan, supra*, 598 F.2d at 852, and *People* v. *Santos*, 26 Cal. App. 3d 397, 102 Cal. Rptr. 678 (1972). *Duncan* did not involve a police custody situation, but simply referred to cases that did. *Santos* found not to be clearly erroneous the trial court's finding

In reaching this conclusion, the Supreme Judicial Court has confused justifiable expectation of *privacy* with justifiable expectation of *confidentiality*.

Petitioner, in his conversation with Police Chief Pierce, had just as much expectation of privacy—that is, that he was talking to the person before him alone, and that his conversation was not being overheard by others—as did Katz, the occupant of the telephone booth, in *Katz* v. *United States*, 389 U.S. 347. As this Court said in *Katz*, "the Fourth Amendment protects people, not places" (389 U.S. at 351-52); and Look was entitled to protection from overhearing in the interrogation room just as Katz was entitled to such protection in the telephone booth. What a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." The action of the police officers in electronically listening to petitioner's words "violated the privacy upon which he justifiably relied" while using the private room, and "thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353. As the *Katz* case shows, the fact that the electronic device did not involve a trespass is of no "constitutional significance." (Ibid.)[10]

Several decisions of this Court have held secret electronic recording or transmission by a law enforcement officer conversing with a suspect to be permissible.

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that the defendant, while in police custody, realized his conversation was being monitored. In the instant case, the finding is clear that petitioner had no knowledge of the surveillance.

[10] The present case raises much the same question as that which was left undecided in *Lanza* v. *New York*, 370 U.S. 139. *But see United States* v. *Hearst*, 563 F.2d 1331, 1345 n. 10 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978).

*United States* v. *White*, 401 U.S. 745; *Osborn* v. *United States*, 385 U.S. 323; *Lopez* v. *United States*, 373 U.S. 427; *On Lee* v. *United States*, 343 U.S. 747. In each of these cases, the law enforcement officer who was face-to-face with the suspect was a party to the interception. Since the decision in *Katz* v. *United States*, the legal conclusion supporting these decisions has been that the surveillance did not violate the suspect's justifiable expectation of privacy.[11] Mr. Justice White has explained the basis for this conclusion as follows:

> When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa* v. *United States*, [385 U.S. 293]. It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another.

*Katz* v. *United States*, *supra*, 389 U.S. at 363 n.* (White, J., concurring). *See United States* v. *White*, *supra*, 401 U.S. at 748-54.

The present case involved surreptitious surveillance without the knowledge of either party to the intercepted conversation, which is a very different situation. *See generally Osborn* v. *United States*, *supra*, 385 U.S. at 327. When surveillance is by such an "uninvited ear," the rationale for the above-cited cases of this Court is no longer applicable. Though a person

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[11] Previously, the basis had been the lack of any interference with property rights. *See generally Cioffi* v. *United States*, 419 U.S. 917, 918 (Douglas, J., dissenting from denial of certiorari).

may have reason to believe that the person to whom he speaks may be the source of communications to others, this does not give him reason to suspect that third parties are listening to their conversation without the knowledge or consent of the person to whom he is speaking.

The court below seemed to think that the situation was changed because petitioner had received *Miranda* warnings. However, *Miranda* warnings do not in any way indicate covert surveillance by third parties. Indeed, *Miranda* warnings would be more likely to suggest to a suspect that the police are dealing with him openly and fairly. Moreover, the fact that a suspect is at a police station should not be deemed to alter his justifiable expectations about police behavior. Police conduct that would be unlawful elsewhere cannot be neutralized simply because it occurs at a police station. If anything, constitutional and statutory provisions designed to protect citizens from overzealous police investigative tactics should be applied to the interrogation room with heightened, not relaxed, vigilance.

The specific facts of this case, moreover, indicate a serious danger of abuse. Here, petitioner was placed alone in a room with a police officer who was his longtime acquaintance,[12] supposedly to await the arrival of the detectives in charge of the investigation who would conduct the interrogation. Not suspecting they were being bugged, the two men had a frank and sometimes emotional discussion of the circumstances surrounding the alleged crime. Through the covert electronic surveillance, all of the information petitioner revealed

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[12] The trial judge quoted Pierce as saying to the petitioner: "I've known you all my life." (Appendix B, *infra*, p. 13a; R. 38.)

under these circumstances was disclosed to the investigators. We respectfully submit that this violated the Fourth Amendment and the Federal statute.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 1980

# APPENDIX

## APPENDIX A

[Massachusetts Superior Court, Plymouth County]

**No. 58370.**

**Rulings and Order on Defendant's Motion to Dismiss for Lack of Speedy Trial.**

The defendant, who is charged with murder in the first degree, filed a motion on April 5, 1978 for dismissal of the indictment on the ground that he has been denied his right to a speedy trial as guaranteed by the Sixth Amendment of the Federal Constitution. The defendant does not contend that the passage of time between the filing of his motion to dismiss and the present date be considered in ruling upon the motion. The defendant does contend that his right to a speedy trial has been denied for the following reasons:

1. There was an unreasonable passage of time between the arrest of the defendant on January 29, 1974 and the Commonwealth's request for a trial date on March 27, 1978, during which defendant was not brought to trial.

2. The Commonwealth was responsible for the delay without any valid reason therefor.

3. The delay has prejudiced the defendant in that: (a) one of the defendant's witnesses, a Ms. Betty Roy, has disappeared and is no longer available to testify; (b) two of the Commonwealth's expert witnesses have diminished memories of facts which are exculpatory of the defendant; (c) defendant himself has a diminished memory of the incident; (d) defendant's physical and emotional health have been detrimentally affected.

Before stating the conclusions of law and the rulings, it is necessary to set forth several essential facts that have been found by the court. A more complete statement of factual findings will be attached. The court finds:

1. There was a period of fifty months and seven days between defendant's arrest on January 29, 1974 and his filing of the motion to dismiss on April 5, 1978, during which time the Commonwealth did not bring the defendant to trial.

2. Prior to April 5, 1978, the defendant did not, at any time or in any manner, request a trial date or otherwise assert his right to a speedy trial.

3. On or about January 28, 1974, the defendant allegedly shot and killed his wife. On January 29, 1974, the defendant was arrested, and on May 29, 1974, he was indicted on a charge of murder. On March 17, 1975, a judge of the Superior Court allowed the defendant's motion to suppress certain evidence consisting of statements made by the victim to ambulance personnel who responded to a call after she had been shot.

On March 26, 1975, the Commonwealth filed an application under G.L. c. 278, sec. 28E for leave to appeal the allowance of the motion to the Supreme Judicial Court before the trial of the indictment. The Commonwealth thereafter took no further action on the application with the result that on November 1, 1975 an order was entered for the dismissal of the proceeding on November 22, 1975. On the latter date a judgment of dismissal was entered. No action was taken after the judgment of dismissal until November 2, 1977 when the Commonwealth filed a motion to vacate the judgment. On November 22, 1977, the Supreme Judicial Court (Quirico, J.) denied the motion to vacate the judgment. On March 27, 1978, the Commonwealth filed a request with the Chief Justice of the Superior Court for a trial assignment.

4. Defendant was not responsible in any way for the failure of the Commonwealth to bring him to trial by March 27, 1978. The Commonwealth, through the Plymouth County District Attorney's Office and the Attorney Gen-

eral's Office, which was to prosecute the interlocutory appeal of the motion to suppress, was responsible for the delay in bringing the defendant to trial. There is no explanation of the delay in the record. There is also no evidence that the Commonwealth in any way deliberately or intentionally delayed these proceedings.

5. The defendant has failed to prove that the delay of the trial diminished his recollection of the facts and circumstances of his wife's alleged shooting in 1974. During the evidentiary hearing on the motion, the defendant exhibited a short-term memory deficiency. He was unable to recall the substance or content of certain affidavits he had signed as recently as May and September of 1978. Thus, defendant's vague memory of an alleged conversation in 1974 was not proven to be directly attributable to the passage of time. In fact, the defendant could not prove at what point he had ever had a clear recollection of the alleged 1974 conversation.

6. The defendant did not demonstrate that his health deteriorated during the delay in these proceedings. His allegations to that effect were not substantiated by medical testimony.

7. Ms. Betty Roy, a witness the defendant intended to call at trial, is now missing and unavailable to testify. Ms. Roy lived with the defendant and his wife for a period of two to three years until approximately fifteen months before Ms. Look's death. During the fifteen months prior to January 28, 1974, Ms. Roy saw the defendant and his wife on two occasions: the first being in May, 1973 for a few days at Ms. Roy's home in Maryland; the second being in late November of 1973 for approximately eight days at defendant's home. A private investigator, retained by defendant, interviewed Ms. Roy in 1974 and testified at the hearing on the motion. Ms. Roy's testimony would bear upon defendant's motive inasmuch as it concerns the general cordiality of the relationship between the defendant

and his wife. The testimony would be limited because of the remoteness in time of her observations from Ms. Look's death. A witness named Mr. Ferrara lived with the defendant and his wife intermittently for several years immediately preceding the death of Ms. Look. Ferrara is available as a witness, and his testimony would apparently be similar to that of Ms. Roy were she available. The defendant will not be greatly prejudiced by Ms. Roy's failure to testify.

8. The two expert witnesses retained by the Commonwealth have present recollection only as to the matters contained in their reports written at the time of the event. Defendant has not proven a lapse of memory on the part of the experts, there being no evidence that the experts ever observed or recalled any facts beyond those contained in their reports.

**Rulings of Law.**

Factors to be considered in determining whether a particular defendant has been deprived of his right to a speedy trial include: (1) length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Barker* v. *Wingo,* 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972). These are related factors and must be considered together with such other circumstances that may be relevant.

**1. *Length of Delay.***

In *Barker* v. *Wingo,* 407 U.S. 514 (1972), the court noted that the "length of delay is to some extent a triggering mechanism." Examples of cases which did trigger an inquiry are: *Commonwealth* v. *Dabrieo,* 1976 Mass. Adv. Sh. 1957, 352 N.E.2d 186 (27-month delay); *Commonwealth* v. *Cooke,* 1976 Mass. App. Ct. Adv. Sh. 144, 341 N.E.2d 907 (11-month delay); *Commonwealth* v. *Gilbert,* 366 Mass.

18 (1974) (31-month delay); *Commonwealth* v. *Dominico*, 1974 Mass. App. Ct. Adv. Sh. 49 (19-month delay); *Commonwealth* v. *Horne*, 362 Mass. 738 (1973) (40-month delay); *United States* v. *Brown*, 495 F.2d 593 (1st Cir. 1974) (17-month delay); *United States* v. *Churchill*, 483 F.2d 268 (1st Cir. 1973) (over 26-month delay).

In the case at bar there was over a 49-month delay between defendant's arrest and the Commonwealth's request for a trial date. Clearly, the length of the delay in this case "triggers" an inquiry into the three remaining factors named in *Barker*.

**2. *The Reason for the Delay.***

A deliberate attempt to delay the trial in order to hamper the defense is weighted heavily against the government. Delays due to negligence on the part of the prosecution or an overcrowded court docket are neutral and are weighted less heavily although the ultimate responsibility for such circumstances rests with the government. *Barker* v. *Wingo*, 407 U.S. 514, 531 (1972); *Commonwealth* v. *Gove*, 366 Mass. 351 (1974); *United States* v. *Churchill*, 483 F.2d 268 (1st Cir. 1973).

The delay in the trial of defendant Donald Look clearly fits into the category of negligence on the part of the prosecution. Since the Commonwealth was the sole cause of the delay, this factor will be weighed for the defendant.

**3. *Defendant's Assertion of His Right.***

The failure of a defendant to assert his right to a speedy trial prior to filing a motion to dismiss does not preclude success on the motion. However, "the defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to

prove that he was denied a speedy trial." *Barker* v. *Wingo,* 407 U.S. 531-532, 33 L. Ed. 2d 118, *Commonwealth* v. *Horne,* 362 Mass. 738, 742 (1973). Moreover, a "defendant who asserts that his right to a speedy trial has been abridged presents a strong case if he has established on the record that he diligently sought a trial. Delay, however, may benefit a defendant in particular circumstances, and a record which shows the defendant's indifference to the date of trial cannot strongly support a claim of the denial of his right to a speedy trial." *Commonwealth* v. *Beckett,* Mass. Adv. Sh. (1977) 1922, 1926.

In this case, defendant Look's failure to assert his right to a speedy trial before April 5, 1978 weighs heavily against him. Indeed the defendant's extended inaction in this case strongly indicates that the defendant did not want to be tried. *Commonwealth* v. *Dabrieo,* Mass. Adv. Sh. (1976) 1957, 352 N.E.2d 186, 192. Defendant explains his failure to assert his right "by his feeling that the Commonwealth may not go forward because of the weakness of their case after defendant's motion to suppress certain evidence had been allowed." Defendant's Memorandum at 11. While this explanation is plausible and understandable, it does not negate the fact of defendant's acquiescence. In *Barker* it was significantly stated that: "We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defedant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted ex parte. But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial." *Barker* v. *Wingo,* 407 U.S. at 536, 33 L. Ed. 2d at 119. Further inquiry must turn then upon the alleged prejudice caused by the delay.

**4. *Prejudice to the Defendant.***

The interests of the defendant which must be considered with regard to prejudice include: (a) preventing oppressive pretrial incarceration; (b) minimizing anxiety and concern of the accused; and (c) limiting the possibility that the defense will be impaired. *Barker* v. *Wingo,* 407 U.S. 532, 33 L. Ed. 2d 119.

Defendant Look has not been subject to incarceration while the trial was delayed. As noted above, the court finds as a fact, after testimony on the motion, that defendant had not substantiated any alleged damage to his physical or emotional health. The court also finds that it was not proven that the memories of either the defendant, or the Commonwealth's two expert witnesses were diminished by the delay in the proceedings. The defendant has the burden of showing prejudice to his defense sufficient to warrant dismissal. *Commonwealth* v. *Beckett,* Mass. Adv. Sh. (1977) 1922, 1927, *Commonwealth* v. *Gove,* 366 Mass. 351, 361 (1974). The defendant's claim of prejudice must therefore be substantiated, if at all, by the absence of Ms. Roy.

In weighing the prejudice to the defendant of Ms. Roy's unavailability, the failure of defendant to complain of the trial delay must be considered. "The court must consider demand or lack of demand to be an indication of the severity of the prejudice to the defendant." *Commonwealth* v. *Dabrieo,* Mass. Adv. Sh. (1976) 1957, 352 N.E.2d 186, 192. "If the defendant were truly concerned that the passage of time would undermine his ability to defend himself, common sense dictates that he would have pressed for a speedy trial." *Commonwealth* v. *Gilbert,* 366 Mass. 18, 21 (1974). According to defendant's testimony, Ms. Roy had always been a person who moved frequently. Defendant's failure to keep track of her whereabouts and his failure to press for a speedy trial seem to negate her alleged essentiality to the defendant's case.

Ms. Roy has not been shown to be an essential witness. As previously stated, her testimony would be strictly limited to her observations of the defendant and his wife. Her testimony may well have been excluded completely because of the remoteness in time (eight months and two months before January 28, 1974) and the brief duration of her observations during the 15 months preceding the death of Ms. Look. As Ms. Roy did not observe any of the factors or circumstances directly surrounding the alleged shooting, her testimony would be relevant, if admissible, only to the general issue of motive. Furthermore, Mr. Ferrara, who is available, will testify on substantially the same subject matter as Ms. Roy. Mr. Ferrara's testimony is more likely to be admissible inasmuch as he, unlike Ms. Roy, resided with the defendant until the time of Ms. Look's death.

In *Commonwealth* v. *Campbell,* Mass. App. Ct. Adv. Sh. (1977) 366 N.E.2d 54, defendants, who were accused of kidnapping, alleged prejudice in a speedy trial motion because of the unavailability of one Simpson to testify. Simpson was apparently with the defendants on the day of the alleged crime. The court found no prejudice, stating that defendants "have not suggested how Simpson's testimony might have aided their cause. Simpson might have been able to testify as to what occurred in the car, but she was not present in Calvin's apartment at the point when force was allegedly exerted and the kidnapping occurred. . . . To prevail on the issue of prejudice, the defendants must demonstrate more than that a missing witness would have corroborated their professed innocence." *Campbell, Id.* at 55. In *Commonwealth* v. *Dabrieo,* Mass. Adv. Sh. (1976) 1957, 352 N.E.2d 186, 192, the court noted that in "view of the abundance of direct evidence produced against him at trial, the defendant must do more to establish prejudice than baldly assert the witnesses who obviously will testify in other areas can corroborate my innocence."

The preceding cases require, for a showing of prejudice, that the unavailable witness would have produced direct evidence of innocence. In the present case Ms. Roy could not produce direct evidence of innocence. Her most recent observations of the defendant were at least two months prior to the incident. Ms. Roy's testimony, if available and admissible, would be circumstantial and not exculpatory. Therefore, Ms. Roy's unavailability has not been shown to be prejudicial.

**Ruling and Conclusion.**

Of the four factors set forth in *Barker* v. *Wingo,* prejudice is clearly weighted more heavily than the others. *Barker* states that one way in which a defendant can overcome his failure to assert his right to a speedy trial is to show that the delay was prejudicial. *Barker* v. *Wingo,* 33 L. Ed. at 119. In *Commonwealth* v. *Blaney,* Mass. App. Ct. Adv. Sh. (1977) 154, each of the other three factors weighed in favor of the defendant. There was a 29-month delay, caused by the neglect of the Commonwealth, to which defendant continually protested by motions for a speedy trial. Nevertheless, the Appeals Court affirmed the denial of the motion to dismiss because defendant could not demonstrate prejudice, the fourth factor. The recent case of *Commonwealth* v. *Beckett,* Mass. Adv. Sh. (1977) 1922, 1926 holds that:

> "Although a delay may be so great as to be inherently prejudicial, especially in the absence of a contrary demonstration by the prosecution, . . . we have held generally that a defendant has the burden of showing prejudice to his defense sufficient to warrant dismissal. . . . A delay of over four and one-half years is substantial, and, if the defendant had been pressing diligently for trial during that period, . . . we would accept the proposition that the burden falls on the Commonwealth to establish the absence of prejudice to

> the defendant. Here, however, the defendant has not created a presumption of prejudice by persistently seeking a prompt trial, and we conclude that she has the burden of proving prejudice to her from the delay."

It is clear from the preceding analysis that the defendant, especially in view of his failure to assert his rights, is not entitled to a dismissal without a showing of prejudice. The court in *Campbell* would not dismiss the indictment without a showing of prejudice even where defendant *had* asserted his rights. *Barker* and *Beckett* make it clear that a failure to assert rights, even in the face of a four and one-half year delay, must be overcome by a showing of prejudice. In the instant case, defendant Look has shown only a lengthy delay for which the Commonwealth was negligently responsible. Defendant has not, however, fulfilled his burden of showing prejudice. This court agrees that the delay in this case has been regrettably long and inexcusable. However, in view of his failure to previously assert his rights or show prejudice, defendant's motion to dismiss for failure to grant a speedy trial must be DENIED.

HERBERT F. TRAVERS, JR.,
*Justice of the Superior Court Department.*

Entered: September 22, 1978.

## APPENDIX B

[Massachusetts Superior Court, Plymouth County]

**No. 58370.**

**Decision on Defendant's Motions to Suppress I and III.**

The Court conducted an evidentiary hearing upon the two motions. Motion I seeks to suppress the statements of the defendant to Lieutenant Robert R. Masuret and Lieutenant Thomas E. Carr on the grounds that the defendant received deficient Miranda warnings and further that his emotional state prevented any proper waiver of his Miranda rights. Motion III seeks to suppress the statements of the defendant and any evidence derived therefrom made to Rochester Police Chief Walter Pierce upon the grounds that these statements were intercepted and overheard electronically by three Wareham police officers and a State Police trooper in violation of State and Federal law. Both of these motions to suppress are denied and the exception of the defendant is noted. The factual findings and rulings of the Court are stated hereinafter.

At approximately 11 p.m. Chief Pierce received an emergency call at his home (In the Town of Rochester, the telephone lines to the police department run directly to the Chief's home. The Chief's wife is the department dispatcher) from the defendant Look. He had known Look almost all his life. Look requested that an ambulance be sent to his house. Apparently he also informed Pierce of the basic nature of the reason for the ambulance, namely, that his wife had been seriously wounded by a shotgun, because immediately thereafter Pierce had his sergeant, Chamberlain, and the State Police notified that an incident had occurred requiring their attention, and he went personally to the Tobey Hospital emergency room. Pierce arrived there about 10 minutes after receiving the call from Look and found Look at the hospital.

Pierce remained at the hospital with Look until approximately 11:50 p.m. During this interval he and Look had a conversation alone in a room in another part of the hospital for about five to ten minutes. During this conversation Pierce explained to the defendant his Miranda rights and also had the defendant sign a form relating to his Miranda rights. A State Police trooper, Johnson, also gave the defendant his Miranda rights. There apparently was some conversation between Pierce and the defendant concerning the shooting of his wife. This may be inferred from the testimony of a State Trooper, Tavares, who testified that he had learned from one of the Wareham officers at the hospital that Look had said that he had killed his wife. However, at the hearing on these motions, no direct evidence of what Look said to Pierce was elicited.

Shortly before 11:50 p.m. the defendant's wife was pronounced dead and he was informed of this fact. He requested to see her and was permitted to do so. He put his arms around her and cried. He was very upset and did not want to leave her. At the request of Pierce, Wareham Police Officer Sweeney helped forcibly removed Look from his wife. This resulted in Look striking Sweeney twice. As a result of this and Look's disturbed emotional state, Pierce had handcuffs put on the defendant. Look was then taken to the Wareham police station and within that station to an interrogation room. During the entire time Look was in the company of Pierce at the hospital he was in an upset state.

Look and Pierce were alone in the room until Lieutenants Masuret and Carr arrived later. During this time period Look made a number of statements to Pierce. It was not an interrogation in the usual sense of the word because Pierce did not ask the defendant any questions. Look essentially rambled on. He told Pierce that he was cleaning a gun and that it went off accidentally resulting in the shooting of his wife. He asked Pierce, "Do you know how it feels to shoot someone you love?" Look also informed

Pierce that previous to the shooting he and his wife had had an argument at some time. He provided other details concerning the shooting, the essence of which was that he was cleaning his gun and that it had gone off accidentally. At one point Pierce told the defendant to shut up, that he was just driving himself crazy. At about 12:45 p.m. Look asked and was given permission to make a phone call. The talk between he and Pierce ended at this point. While Pierce and Look were in the room, an intercom system, which had been installed in the building when it was first constructed, was on, permitting at least some portion of what was said by Pierce and Look to be heard by police officers who were at the desk area. At the desk there was some type of switching device which permitted the desk officer to turn on the intercom system in any room in the building. This system was installed for the purpose of permitting communication between various parts of the building in the normal course of the police department's business.

While Look and Pierce were in the room, State Police Officer Tavares and Wareham Police Officers Sweeney and Camandona and perhaps an Officer Bourne were in the area of the desk. The only thing overheard by Tavares was Pierce saying to Look something to the effect that he should not say some particular thing, or say anything to the State Police. As a result, when State Police Lieutenants Masuret and Carr arrived at the station at about 2:30 a.m., he and the Wareham police officers told them that Pierce had told Look not to say anything to the State Police. Officer Sweeney overheard Look on the intercom say, "Walt, I killed her, I killed her." To which Pierce replied, "Don't say that. I've known you all my life." He also heard Look say that he had had an argument with his wife earlier. Camandona heard Look say to Pierce, "I killed her, Walt, I killed her." Pierce stated, "You didn't kill her. I've known you all my life." He further heard Look state that he had had an argument with his wife that evening. Pierce then stated, "Well, you don't have to say anything about that." Neither

Pierce nor Look had any knowledge that their conversation was being transmitted over the intercom, nor did they in any fashion consent thereto.

When Masuret and Carr arrived they spoke very briefly to the defendant and one or more of the officers at the desk before going directly into the room where the defendant and Pierce had been previously. Masuret and Carr were told by one or more of the police officers at the booking desk before they interrogated Look that Pierce had told Look not to say anything to the State Police. They were also told something about Look having had an argument with his wife on the day of the shooting. It also appears certain from the number of times that Look had made the statement previous to this time that they must have been told Look stated that he had killed his wife and that it was an accident. They were not told that any of this information had been obtained by listening to the intercom nor were they aware in any fashion that the intercom had been on while Look was speaking. They had previous to coming to the Wareham Police station been at the Look home to view the crime scene. They had been originally notified of the shooting as a result of Pierce's dispatcher calling the State Police shortly after 11 p.m. Lieutenant Masuret is attached to the District Attorney's office and it is in keeping with the customary procedure in this county for the State Police officer attached to that office to conduct the investigation in every homicide case (this practice apparently includes cases that appear to be potential homicide cases).

The reason that Wareham police officers listened to the intercom was because of their concern as to whether the defendant might act in any violent manner while he was with Pierce. This was because of the problem that they had had with the defendant previously in the emergency room at the hospital and, further, because he was alone with Pierce in the room with the door closed. (Pierce is an elderly man).

Masuret and Carr were alone with the defendant in the interrogation room for about one-and-a-half to two hours, commencing at about 2:40 a.m. At the conclusion of their conversation with Look he was booked in the police station at about 5:00 a.m. The interrogation of the defendant was conducted primarily by Masuret with Carr taking notes from time to time and asking a few questions. Masuret commenced the interview by fully and adequately informing the defendant of his Miranda rights. In response, Look told them that he had previously been informed of his rights by Pierce and another officer and as a result he was well aware of them. About half-way through the interview Masuret informed the defendant once again of his Miranda rights. During the course of the conversation with Look he was from time to time upset and cried. On isolated occasions he showed some anger, walked around and even pounded on the table, but his general appearance was that of a normal, rational person who spoke lucidly and who was suffering from grief and perhaps guilt associated with the loss of his wife. He was not coerced in any fashion. He had had his handcuffs removed upon his first arrival at the police station. At no time did Look indicate that he did not wish to talk to the police officers. To the contrary, he spoke quite freely to the police officers just as he had when he had spoken with Pierce in the police station.

In the course of the interview with the police officers the defendant told them that earlier in the day in question he had gone to the K-Mart and had bought some food, and during the evening he had had three or four beers and his wife had had a couple. They watched the beginning of a television show called Medical Center when he decided to leave the room and clean his gun for a contemplated usage of it hunting. He put the gun with cleaning rags and oil on a table, then apparently left the room to go to the "john" and after that returned. He was apparently questioned regarding there being no paper underneath the articles he put on the table. He was also asked about a hamburg that

he prepared himself at some point. He stated that at some point his wife came into the room and the gun discharged accidentally. He was questioned regarding the happening of this "accident" and apparently at some point in answer to a statement that he must have had his finger on the trigger, he indicated in some way that that must have been the case. There was some discussion at some point about a mild argument that had occurred between Look and his wife earlier that day regarding the breeding of their dogs. (Look operated a kennel with his wife). Throughout the interview apparently on a great number of occasions Look stated that he had shot his wife and that it had been an accident.

I find that the defendant was arrested at the hospital at the time that handcuffs were placed upon him in the emergency room. All statements made by him thereafter must be viewed as custodial. I find that the defendant was given full and adequate Miranda warnings at the hospital, by Pierce and Trooper Johnson, and thereafter on two occasions by Lieutenant Masuret. I find that at the time of all of the Look statements in question he was well aware of his Miranda rights and in giving such statements he had voluntarily and knowingly waived such rights. I find that though he was obviously and for very good reason upset and filled with remorse, this did not reach the level where his statements should be described as anything but voluntary. He spoke freely and without any compulsion. His statements certainly to Pierce and to some extent thereafter to Masuret and Carr were of a spontaneous quality, which suggests that they were initiated to some extent by the need for the defendant to expiate himself of his grief and guilt. This guilt is not intended to mean guilt for having committed a crime, though that is a possibility, but rather is intended to convey the feeling associated with having done something which played a role in the shotgun death of his wife. I find that in considerable detail prior to the statements which have been made the subject of the

motions the defendant had communicated to Pierce and apparently other police officers the basic information that he had killed his wife and that it was an accident. See the report of Chief Pierce, which is attached to the motion III. I find that the conversation between Look and Pierce in the police station, which was to some degree a repetition of what had been previously stated to Chief Pierce was hardly conducted under circumstances where the defendant had any expectation of privacy. He had been fully informed of his rights and knew that he was in a police station speaking with a police officer. He had every expectation that his statements would be used against him. The conversation which took place between Look and Masuret and Carr came about as a result of the police officers being called to the police station in keeping with the usual police practice which required them to investigate this type of crime. It did not result from anything in the statement of Look to Pierce. The information that they received from the officers who heard some statements on the intercom did not in any way cause them to speak to the defendant nor did what they were told in any way affect the questions they asked of the defendant or the defendant's responses. The overhearing of the Pierce conversation by means of the intercom in this situation was entirely collateral and unassociated with what took place in both the Pierce conversation and the Masuret and Carr conversation. The latter was in no sense legally or in reality the fruit of any illegal electronic interception.

**Legal Discussion of Motion to Suppress III.**

The defendant contends that several sets of statements made while in an interrogation room at the Wareham police station are suppressible because of eavesdropping by police officers in violation of G.L. c. 272, s. 99 and 18 U.S.C. sec. 2510 *et seq.* Each group of statements will be examined separately to determine their admissibility.

**A. *Testimony of Chief Pierce.***

G.L. c. 272, sec. 99 and 18 U.S.C. sec. 2510 *et seq.* generally prohibit the secret interception or disclosure of oral communications without conforming to certain requirements or exceptions set forth therein. Violation of either statute results in the suppression, in any criminal proceeding involving the communicant, of the statement intercepted. G.L. c. 272, sec. 99P, 18 U.S.C. sec. 2518(10)(a). However in this instance the Court need not reach the question of which statute, if any, was violated by the eavesdropping officers. Regardless of what other officers may have done, Chief Pierce did not violate any statute because *he did not intercept* any conversation. Clearly Chief Pierce, as an actual participant in the conversation, may testify as to statements made directly to him by the defendant. See dictum in *Flemmi* v. *Gunter,* 410 F. Supp. 1361, 1367 (D.C. Mass. 1976). See also *Meredith* v. *Gavin,* 446 F. 2d 794, 790 (CA Mo. 1971) and *Smith* v. *Wunker,* 356 F. Supp. 44, 46 (D.C. Ohio 1972).

**B. *Testimony of Officers Outside the Interrogation Room.***

The Commonwealth, during the evidentiary hearing, made a representation to the Court that it would not present, as part of its case-in-chief, the testimony of the eavesdropping officers with respect to statements they may have overheard. Therefore the issue of suppression of the testimony of those witnesses is *not* before the Court at this time. Likewise the Court need not, at this time, determine the legality of the activities of the officers outside the interrogation room. If and when the Commonwealth changes its position in this respect, it must notify the Court and the defendant in a timely fashion.

**C. *Statements Made to Lts. Masuret and Carr.***

Defendant contends that these statements were "fruit of the poisoned tree" because they were obtained through

the use of "tainted" information provided Lts. Masuret and Carr by the eavesdropping officers. The Court finds this contention to be unproved and without merit.

**I. Fruit of the Poisonous Tree.**

It is clear that knowledge derived from evidence "gained by the Government's own wrong cannot be used by it." However, if such facts are "gained from an independent source they may be proved like any others." *Silverthorne Lumber Co. Inc.* v. *U.S.*, 231 U.S. 385, 392 (1920). The Supreme Court relied upon the "exclusionary rule" of *Silverthorne* in the case of *Wong Sun* v. *U.S.*, 371 U.S. 471, wherein it was stated:

> We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' *Id.* at 488.

While *Wong Sun* and *Silverthorne* concerned constitutional violations, the Supreme Court applied the very same principles to violations of a federal wiretapping statute in *Nardone* v. *U.S.*, 308 U.S. 338 (1939). Furthermore, in Commonwealth v. Glavin, 354 Mass. 69, 72 (1968), the Supreme Judicial Court applied the rule of *Wong Sun* to violations of Mass. G.L. c. 272, sec. 99.

In view of the above discussion, this Court is compelled to apply the principles of *Wong Sun* and *Nardone* in determining if the statements of the defendant to Lts. Masuret and Carr must be suppressed. Pursuant to the procedure set forth in *Nardone* v. *U.S.*, 308 U.S. 338, 341, this Court held a full evidentiary hearing, according an opportunity

to the accused to prove that his statements were fruits of the poisonous tree. This Court need not determine the legality of the activities of the eavesdropping officers because it has concluded, as in *Wong Sun,* that "granting the establishment" of illegality, the defendant's statements to Lts. Masuret and Carr were obtained by "means sufficiently distinguishable to be purged" of any "taint".

As previously stated in its findings of fact above, this Court has determined that the information that Lts. Masuret and Carr received from the officers who heard some statements on the intercom did *not* in any way cause them to speak to the defendant nor did what they were told in any way affect the questions they asked of the defendant or the defendant's response. The conversation between the defendant and Masuret and Carr, and the information derived therefrom, were the result of usual police practice and procedures, and not of tainted information. "Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dispute the taint." *Nardone* v. *U.S.,* 308 U.S. 338, 341 (1939). In the present case, the alleged causal connection is not only attenuated, it is nonexistent. Defendant's statements to Lts. Masuret and Carr did not constitute "fruits of the poisonous tree" and are therefore not suppressible on those grounds.

**II. Expectation of Privacy.**

As stated in the Court's findings of fact above, the defendant in this case did not have a justifiable expectation of privacy when he made statements, in the Wareham police station, to Chief Pierce. Defendant was already in custody and was fully conscious of the fact that Chief Pierce was a police officer. It became apparent at the trial that other police officers, including an Officer Ruilson, entered the interrogation room and conversed with the defendant

and Chief Pierce prior to the arrival of Lts. Masuret and Carr.

In *Katz* v. *U.S.*, 389 U.S. 347, 353 (1976), the Supreme Court held that electronic eavesdropping violates the Fourth Amendment if it violates the privacy upon which a defendant justifiably or reasonably relies. Thus, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz,* 389 U.S. 351. In this case it is clear that defendant knowingly exposed his statements to the government by speaking to a police officer. There was absolutely no evidence presented to indicate that the defendant somehow sought to "preserve as private" his statements to Chief Pierce.

In *Hoffa* v. *U.S.*, 385 U.S. 293, 302 (1966), the Supreme Court held that the Fourth Amendment does not protect statements made by a defendant in the misplaced belief that the person to whom he voluntarily confides will not reveal them. The Court went on to apply *Katz* and *Hoffa* in *U.S.* v. *White,* 401 U.S. 745, 751 (1971), wherein it was held that electronic surveillance of statements made by a defendant to an informer "whose trustworthiness the defendant necessarily risks" does not "invade the defendant's constitutionally justifiable expectations of privacy." If a defendant enjoys no justifiable expectation of privacy when he speaks to an undercover agent, then he certainly enjoys no greater expectation when he makes voluntary statements to a known police officer which are overheard by other officers. Defendant in fact had every expectation that his statements to Chief Pierce would be communicated to other police officers in some manner. Defendant's Fourth Amendment rights and his reasonable expectation of privacy were not violated in this case.

**Conclusion.**

Motion to Suppress I, and III are hereby denied.

/s/ HERBERT F. TRAVERS, JR.,
Herbert F. Travers, Jr.,
*Justice of the Superior Court.*

Entered: October 31, 1978.

## APPENDIX C

[Massachusetts Supreme Judicial Court]

COMMONWEALTH *vs.* DONALD J. LOOK.

Plymouth. November 5, 1979. — March 4, 1980

Present: Hennessey, C.J., Quirico, Kaplan, Wilkins, & Abrams, JJ.

INDICTMENT found and returned in the Superior Court on May 29, 1974.

The case was tried before *Travers*, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

*Melvin S. Louison* for the defendant.

*John P. Corbett,* Assistant District Attorney, for the Commonwealth.

QUIRICO, J. On November 1, 1978, a Superior Court jury convicted Donald Look of second degree murder for the killing of his wife on January 28, 1974. Look appeals pursuant to G. L. c. 278, §§ 33A-33G, claiming violation of his right to a speedy trial, and error in the admission of certain evidence. We affirm his conviction.

We summarize the evidence. On January 28, 1974, the defendant and his wife, the victim Susan Look, were at home in Rochester, Massachusetts. Together they operated a dog kennel and a campground, and their home was on the premises of the kennel. Look testified that at approximately 10 P.M. that evening, while the victim was watching television, he went to the basement of his home to obtain a shotgun he wished to clean. He returned to the dining room to clean his gun. Shortly thereafter, the gun discharged and his wife suffered a wound to her abdomen. Look called an ambulance, which took the victim to Tobey

Hospital in Wareham, where she died at about 11:30 P.M. as a result of the gunshot wound. Look asked to see his wife, and became extremely upset. Police officers tried to restrain him, and he struck one officer in the face while resisting. Wareham police read Look his Miranda rights at the hospital, and he signed a form waiving those rights. Look was taken to the Wareham police station, where he and the chief of police, Walter A. Pierce, proceeded to the interrogation room. They remained there until 2:45 A.M. Look told Pierce that he had had an argument with his wife, had gone to get his shotgun to clean it, and had shot his wife accidentally. Four officers at the front desk overheard Look's conversation with Pierce via an intercom. Neither Look nor Pierce knew that the officers were listening, and neither expressly consented thereto. Two of the officers said at a pretrial hearing that they heard Pierce tell Look not to tell the State Police that he and his wife had had an argument. The Commonwealth did not offer as part of its case-in-chief at trial any testimony regarding the overhearing of this conversation between Look and Pierce. It did, however, offer Pierce's testimony as to the substance of his conversation with Look. Pierce testified that he told Look, "Don't keep torturing yourself, it was an accident," in response to Look's repeated exclamations that he had killed his wife. Pierce claimed he was attempting to "calm him [Look] down." Pierce neither arrested Look nor charged him with any crime.

Two State police officers, Lieutenants Masuret and Carr, arrived shortly thereafter, and the desk officers told them of the overheard conversation. Two two lieutenants went into the room alone with Look, gave him his Miranda warnings again, and questioned him for more than two hours. Look repeated several times that he had shot his wife accidentally, while cleaning his gun to go hunting. He was formally booked at 5 A.M. on January 29. Pierce, Masuret and Carr all testified at trial that Look seemed emotionally upset during many parts of the two interrogation periods.

Look was indicted on May 29, 1974, after a probable cause hearing on May 17 in a District Court. Numerous pretrial motions occupied the parties' time from June, 1974, to March, 1975, and the following occurred thereafter:

(1) On March 17, 1975, a Superior Court judge granted a pretrial motion to suppress certain statements of the victim.

(2) On March 26, 1975, the Commonwealth filed an application in this court for an interlocutory appeal of the suppression order, pursuant to G. L. c. 278, § 28E. A single justice of this court dismissed the application on November 22, 1975, for lack of prosecution, and the Commonwealth did nothing further until November 2, 1977, when it filed a motion to vacate the dismissal. This motion was denied on November 22, 1977.

(3) On March 27, 1978, the Commonwealth filed a request in the Superior Court for a trial assignment. On April 5, 1978, Look filed a motion to dismiss for lack of a speedy trial, the first such action Look took to assert his Sixth and Fourteenth Amendment right to a speedy trial. After a hearing, the trial judge filed findings and rulings denying the motion to dismiss.

Look's trial commenced on October 19, 1978, and about that time Look filed the following three pretrial motions to suppress:

(1) The first such motion sought to suppress the statements Look gave Masuret and Carr, and was based on the grounds of inadequate Miranda warnings and incapacity to waive Miranda rights due to "a highly emotional state."

(2) The second motion was to suppress the testimony of one Vivian Ivers, the victim's stepmother. The defense had called Ivers at the 1974 probable cause hearing. Ivers had begun to testify about a telephone call she received

from the victim on the night the victim died. The Commonwealth objected and defense counsel, while first arguing against admissibility of the victim's statements to Ivers, said, "[I]f there is going to be some evidence that it is admissible . . . then I think the whole picture should be before the Court." The judge sustained the Commonwealth's objection. At the trial, however, the Commonwealth sought to introduce Ivers' testimony about the substance of the telephone conversation.

(3) The third motion to suppress involved the conversation between Pierce and Look, and "evidence derived therefrom," on the grounds that the desk officers electronically intercepted the conversation in violation of State and Federal wiretap statutes. G. L. c. 272, § 99, and 18 U.S.C. §§ 2510 et seq. (1976).

The judge, after hearings, denied all three motions. At trial, Ivers testified that at approximately at 10:30 P.M. on January 28, 1974, she received a call from the victim, who said, "Why did you tell Donald that I had a baby at Tobey Hospital," and, "I don't think it's fair[;] I'm getting out of here."[1] She also testified (with corroboration from another witness) that the victim, shortly before her death, had talked of divorcing Look.

1. Look asserts that he was denied his Sixth Amendment right to a speedy trial, as applied to the States through the Fourteenth Amendment, *Klopfer* v. *North Carolina,* 386 U.S. 213, 222-223 (1967), and his analogous right under art. 11 of the Massachusetts Declaration of Rights. *Com-*

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[1] There was a great deal of testimony about the substance of the argument Look had with the victim just before the shooting. Look told Carr and Masuret it had concerned mating dogs in the kennel. Look himself testified that there had been a discussion at about 10 P.M. on the night of the homicide about adopting a Vietnamese baby, and that he had asked the victim if it was true she had borne a child prior to their marriage.

*monwealth* v. *Green,* 353 Mass. 687, 690 (1968). The analysis of this claim necessitates a balancing of four factors: (1) length of the delay, (2) reasons for the delay, (3) assertion of the right, and (4) prejudice to the defendant. *Barker* v. *Wingo,* 407 U.S. 514, 530-533 (1972). *Commonwealth* v. *Dabrieo,* 370 Mass. 728, 735 (1976). *Commonwealth* v. *Gove,* 366 Mass. 351, 361-365 (1974).

a. *Length of delay.* In the present case the right to a speedy trial attached at the time Look was indicted, since he was not in custody prior thereto. *United States* v. *Marion,* 404 U.S. 307, 320-321 (1971). *Gove, supra* at 357. *Commonwealth* v. *Campbell,* 5 Mass. App. Ct. ——, ——, (1977).[a] The length of delay from that date, May 29, 1974, to the commencement of trial on October 19, 1978, is unquestionably sufficient to "trigger" further inquiry into whether Look was denied a speedy trial in violation of his constitutional rights. See *Commonwealth* v. *Beckett,* 373 Mass. 329, —— (1977)[b] (fifty-five month delay); *Commonwealth* v. *Boyd,* 367 Mass. 169, 179-180 (1975) (fourteen month delay); *Commonwealth* v. *Horne,* 362 Mass. 738, 739, 743 (1973) (forty-eight month delay). In looking to the other three factors delineated in *Barker, supra,* we weigh each in the circumstances of this case, keeping in mind that the defendant bears the burden of showing prejudicial delay sufficient to warrant dismissal of the indictment against him. *Commonwealth* v. *Gilbert,* 366 Mass. 18, 22 (1974). *Commonwealth* v. *Jones,* 360 Mass. 498, 502 (1971). The length of delay here is clearly to be weighed against the Commonwealth, absent an adequate explanation for that delay.

b. *Reasons for delay.* The Commonwealth has offered no reasons whatsoever for the inordinate delay in this case,

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[a] Mass. App. Ct. Adv. Sh. (1977) 969, 982, 983.

[b] Mass. Adv. Sh. (1977) 1922, 1923.

and thus the defendant was apparently forced to resort to speculation in order to meet his burden on this question.[2]

The judge found that "[t]he Commonwealth, through the Plymouth County District Attorney's Office . . . was responsible for the delay in bringing the defendant to trial. There is no explanation of the delay in the record."[3] Accordingly, he concluded that, in the absence of evidence of intentional or wilful action, the delay "fits into the cate-

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[2] We note parenthetically that, as Look's counsel mentioned in argument before this court, a defendant is not privy to the administrative decisions of the district attorney's office and must therefore be content, under the present system, with whatever he can glean through discovery. The new Rules of Criminal Procedure relieve the defendant of this difficulty to some degree by shifting the burden to the Commonwealth if a defendant has not been brought to trial within certain progressively shorter time periods, eventually to be one year. See Mass. R. Crim. P. 36 (b) (1) (A)-(C), Mass. (1979) (effective July 1, 1979). The new rule provides that certain time periods shall be excluded, such as those encompassing pretrial motions and interlocutory appeals. Mass. R. Crim. P. 36 (b) (2), Mass. (1979). Once the defendant has established a prima facie delay, and the Commonwealth offers no justification, the defendant is entitled to dismissal of the indictment without a showing of prejudice. See Mass. R. Crim. P. 36 (b) (1) (D), Mass. (1979), and Reporter's Notes. Even within the specified time periods, a defendant may obtain a dismissal if he can demonstrate prejudice. Mass. R. Crim. P. 36 (c), Mass. (1979). The new rule, of course, encompasses all existing case law under former G. L. c. 277, § 72A, to the extent that a defendant is not automatically entitled to dismissal if he acquiesces, *Commonwealth* v. *Jones*, Mass. App. Ct. , (1978) (Mass. App. Ct. Adv. Sh. [1978] 1218, 1219-1221); is responsible for the delay, *Commonwealth* v. *Loftis*, 361 Mass. 545, 549-550 (1972); or benefits from the delay, *Commonwealth* v. *Alexander*, 371 Mass. 726, 729 (1977).

[3] The Commonwealth's brief before this court concedes that the delay was due to negligence. This does not relieve the Commonwealth of responsibility for not having presented an explanation of the underlying facts causing the delay at the hearing on the motion to dismiss.

gory of negligence on the part of the prosecution." Although weighing this factor against the Commonwealth, the judge concluded that such negligent delays "are neutral and are weighted less heavily" than intentional delays.

We agree with the judge that the failure to prosecute the application for interlocutory appeal, and the subsequent delay of two years in bringing a motion to vacate the dismissal of that application, constituted negligence in the handling of this case. While we agree with the judge that this delay is to be weighed less heavily than one calculated to frustrate the defense of an accused, see *Barker, supra* at 531, we believe, nevertheless, that it should be weighed quite heavily against the Commonwealth.[4] *Commonwealth* v. *Blaney,* Mass. App. Ct. ——, —— (1977).[c]

c. *Assertion of the right.* The United States Supreme Court expressly rejected a demand-waiver rule in the context of the speedy trial right. *Barker, supra* at 528. The defendant does have a responsibility to assert his right, however, and timely assertion is to be given "strong evidentiary weight." *Id.* at 529, 531. Look did nothing whatsoever to assert his right to a prompt trial until April 5, 1978, ten days after the Commonwealth requested a trial date and nearly four years after his indictment. It appears reasonable to speculate (and the defendant has suggested in his brief before this court) that Look was "gambling" that the Commonwealth had forgotten about him or decided not to pursue his case.

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[4] In a case dealing with the statutory right of a prisoner to trial on additional charges within six months after demand under G. L. c. 277, § 72A, we stated that "[w]here 'the delay or lack of any activity occurred in circumstances neither caused by nor attributable to the defendant,' . . . the Commonwealth must at the very least, explain why such delay is 'reasonably necessary and justifiable.'" *Commonwealth* v. *Alexander,* 371 Mass. 726, 730 (1977).

[c] Mass. App. Ct. Adv. Sh. (1977) 154, 157.

The Commonwealth's application for interlocutory appeal was dismissed on November 22, 1975, and the Commonwealth filed a motion to vacate that dismissal nearly two years later on November 2, 1977. During that time, if Look believed that the Commonwealth considered its case too weak to pursue because of the allowance of Look's motion to suppress the victim's statements (a judgment which might have been quite inaccurate, based on the evidence eventually presented at the trial), he could have filed a motion for trial or a motion to dismiss at any time. He would then have been relieved of any anxiety over whether he would eventually be tried. When the Commonwealth did file its motion to vacate on November 2, 1977, thus signaling Look that it intended to pursue his case, Look still allowed five months to pass before filing his first claim regarding a speedy trial. This inaction on his part must be weighed heavily against him. *Dabrieo, supra* at 737. The speedy trial right is not one which may be kept in reserve in the event that one's belief that the prosecution has overlooked or decided not to pursue his case proves to be erroneous.

d. *Prejudice.* Look claims prejudice resulting from the delay in three respects: unavailability of a potential defense witness, failure of memory of all witnesses, and "anxiety and concern" on Look's part.

The unavailable witness, one Betty Roy, was alleged to have stayed at the Looks' campground in 1972, to have visited with them briefly in November of 1973, to have become friendly with the victim and to have spoken with the victim frequently thereafter. The testimony that Ms. Roy allegedly would have provided is that the marital relationship between Look and the victim was happy and harmonious. The trial judge found that "[h]er testimony may well have been excluded completely because of the remoteness in time (eight months and two months before January 28, 1974) and the brief duration of her observations during the 15 months preceding the death of Ms. Look. As

Ms. Roy did not observe any of the factors or circumstances directly surrounding the alleged shooting, her testimony would be relevant, if admissible, only to the general issue of motive." The judge apparently relied on *Campbell, supra,* and *Dabrieo, supra,* for the principle that to demonstrate prejudice a defendant must show "that the unavailable witness would have produced direct evidence of innocence."

*Campbell* and *Dabrieo* must be limited to their facts,[5] however, and there is not necessarily a requirement that a defendant show that a missing witness might have produced direct (in the sense of eyewitness) evidence of innocence. The speedy trial right is primarily designed to ensure that an accused shall enjoy a full and fair trial, including the right to present witnesses of his choice for any potential effect they might have on the deliberative process of the jury, assuming that the intended testimony is admissible. Testimony about the marital relationship in the present case would have been extremely relevant (assuming that there had been a proper foundation laid), especially in light of the testimony of one Paul Dockham, which was admitted over Look's objection. Dockham testified that, three or four weeks prior to her death, the victim had told him she was unhappy and wanted to divorce Look.

The trial judge correctly found, however, that contrary testimony on this subject would be available. In fact, sev-

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[5] In *Campbell,* the defendants presented no evidence that they searched for the missing witness, and no evidence as to what that witness' testimony might have been. *Commonwealth* v. *Campbell,* Mass. App. Ct. , (1977) (Mass. App. Ct. Adv. Sh. [1977] 969, 986-987). In *Dabreio,* the defendant claimed that "several alibi witnesses" who would have testified that he was at a party on the night of the crime were dead or unavailable. He presented evidence of a search "not undertaken with any great effort," and both the motion judge and this court apparently disbelieved his claim. See *Commonwealth* v. *Dabreio,* 370 Mass. 728, 738 (1976).

eral other witnesses testified that Look and the victim were, in their estimation, happily married. One of these witnesses, Robert Ferreira, had lived with Look and his wife for some time. Look had not demonstrated in any but the most speculative way that Roy would have offered testimony adding anything significant to that of these witnesses.[6] Therefore, we believe the trial judge ruled correctly that Look did not show prejudice with regard to the missing witness. Cf. *Commonwealth* v. *Boyd, supra* at 180-181 (death of one of the defendant's psychiatrists not prejudicial to insanity defense when two of his other psychiatrists testified).

Look's second allegation of prejudice, failure of memory of many if not all witnesses, is similarly without foundation. We have reviewed the transcript, and find no significant failure of memory on crucial issues. In so reviewing the transcript, we were mindful of the fact that "[l]oss of memory . . . is not always reflected in the record because what has been forgotten can rarely be shown." *Barker, supra* at 532.

Regarding the "anxiety and concern" part of the test for prejudice, see *id.*, Look presents a weak claim. As the

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[6] Look also argues that the Commonwealth should bear the burden of proving that Roy did not have potentially exculpatory evidence, relying on *United States* v. *Barket*, 530 F.2d 189 (8th Cir. 1976). In *Barket*, a forty-seven month pre-indictment delay was accompanied by the death of six material witnesses and faded memories of other witnesses. *Id.* at 192. Because the delay occurred before indictment when the speedy trial right had not attached, the court applied a Fifth Amendment due process analysis to uphold a District Court finding of "severe" prejudice. The Court of Appeals stated that "the Government must bear the burden of demonstrating that the missing witnesses did not possess exculpatory evidence." *Id.* at 196. The present case is quite different from *Barket*, where the defendant, because of inaction for which the government was found responsible, had no reason to believe he would have to prepare a defense and faced beginning that task nearly four years after the incident.

trial judge found, Look was not incarcerated pending trial, and his failure to assert his right for over four years belies any present assertion that the delay caused him undue anxiety.

In conclusion, we do not believe that Look's constitutional right to a speedy trial was violated. The delay, while lengthy, and the absence of reasons therefor, were not sufficient to warrant dismissal without a showing of prejudice. Cf. *Moore* v. *Arizona*, 414 U.S. 25, 26 (1973). Look's failure to assert his right during most of the delay, and his failure to demonstrate prejudice, tip the scales against him.

2. Look next argues that the trial judge erred in admitting the testimony of Vivian Ivers regarding telephone conversations she claimed to have had with the victim on the night of the homicide, and with Look a few days after the incident. The ground of his objection is that he was unfairly deprived of discovery during the probable cause hearing in the District Court because the judge sustained the objection of the Commonwealth as Ivers was about to testify about the substance of at least one of these conversations. He relies for this claim on *Myers* v. *Commonwealth*, 363 Mass. 843 (1973).

The import of our analysis and holding in *Myers* is that a defendant who stands accused of a crime has the right to confront and cross-examine witnesses of the Commonwealth, and to present his own witnesses by way of affirmative defense. *Myers, supra* at 852, 856. This is because the accused, before being bound over to the grand jury or tried in the District Court, is entitled under G. L. c. 276, § 38, to a preliminary determination that "the Commonwealth has sufficient competent legal evidence to justify . . . a full trial," *id.* at 849, a hearing which "distinguishes between groundless or unsupported charges and meritorious prosecutions," *id.* at 847. *Stefanik* v. *State Bd. of Parole*, 372 Mass. 726, 731 (1977). *Corey* v. *Commonwealth*, 364 Mass. 137, 138 (1973).

We noted in *Myers* that a common utilization of the probable cause hearing is discovery by the defense, and that the judge should not unduly limit the defendant's cross-examination of prosecution witnesses "in order to effectuate the ancillary discovery and impeachment functions of the hearing . . . ." *Id.* at 857. See also *Commonwealth* v. *Britt*, 362 Mass. 325, 330-331 (1972).

The Commonwealth has no duty to present its entire case at the hearing, however, but simply enough to allow a reliable determination of probable cause. We held in *Lataille* v. *District Court*, 366 Mass. 525 (1974), that a defendant is not entitled by right to a probable cause hearing when a grand jury has indicted him, thereby providing a probable cause finding. *Id.* at 529-531. In response to the defendant's assertion that he had been denied discovery and impeachment, we stated in *Lataille*: "We held [in *Myers, supra*] that complete cross-examination and the opportunity to present affirmative defenses were crucial and necessary *to effectuate a true probable cause standard.* We did not hold then, nor do we hold now, that the discovery and impeachment functions are ends in themselves to be asserted apart from their evidentiary role in ascertaining probable cause where a preliminary hearing is held" (emphasis supplied). *Id.* at 530.

In this case, Look's counsel, not the Commonwealth, called Ivers at the probable cause hearing. Presumably Look was able to interview his witness prior to the hearing,[7] but even if he did not, Ivers testified at the hearing that she had had a conversation with the victim, but not to its substance. The Commonwealth notified Look's counsel approximately two months prior to trial that it intended to

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[7] The trial judge observed that "[t]his Court is certainly not aware of any obstruction put in [Look's] path to such interviewing of a potential witness. . . . [T]his Court is aware that the very experienced defense counsel had available to him the services of a private detective at around the time of the probable cause hearing."

call Ivers. Look therefore had ample time to utilize discovery procedures if he so chose.

We do not construe Look's present claim to be that he was deprived of a valid probable cause determination by reason of the exclusion of direct testimony of his own witness. Although in his brief Look suggests that Ivers might have produced testimony favorable enough to prevent bind-over on a murder charge, he offers nothing to substantiate this claim. Full cross-examination at trial failed to produce any such evidence. Indeed, Ivers' testimony at trial was entirely inculpatory, and it is difficult to fathom how full exploration of her testimony could have helped Look at the probable cause stage. Look may have relied on the District Court judge's determination that the substance of the conversation was inadmissible, but the argument that the Commonwealth is somehow estopped from presenting at trial testimony it did not present at the probable cause hearing is groundless.

3. Look next argues that his statements at the Wareham police station should have been suppressed on three separate grounds.

a. Lieutenant Masuret, when testifying at the probable cause hearing as to warnings given prior to interrogation of Look by Lieutenant Carr and himself, omitted the right to remain silent. At a hearing on a pretrial motion to suppress, Lieutenant Masuret testified that he remembered a conversation with Look's counsel following the probable cause hearing, in which Look's counsel told Masuret he had forgotten to give Look the warning, but Masuret responded that regardless of what he testified, he was sure he had given all the warnings.[8] He and Carr both testified to that effect at trial. Furthermore, they both testified that Look told them he had previously been advised of his rights by Pierce and another officer and was well aware of them.

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[8] Look's counsel took the stand at the hearing and denied that any such conversation occurred.

As we have stated before, "[n]o useful purpose is served by testing on the witness stand the officer's ability to recite accurately from memory the Miranda warnings he read." *Commonwealth* v. *Lewis,* Mass. , (1978).[d] Even if Carr and Masuret did omit one warning, however, the original warnings given at the hospital were sufficient to carry over into the interrogation by Pierce, Carr and Masuret. See *Commonwealth* v. *Alicea,* Mass. , - (1978)[e] and cases cited therein. There is no evidence of a break in the chain of events, such as an exercise of the right to remain silent, which might have necessitated new warnings. See *Michigan* v. *Mosley,* 423 U.S. 96, 102-105 (1975). Look talked freely and continuously to Pierce, and then to Carr and Masuret. Furthermore, he indicated to Carr and Masuret that he still understood his rights as earlier stated to him, and that he wished to waive them. There was no error in the judge's finding that "at the time of all of the Look statements in question he was well aware of his Miranda rights and in giving such statements he had voluntarily and knowingly waived such rights."

b. Look next argues that his highly upset emotional state precluded valid waiver of his Miranda rights and therefore rendered his statements involuntary. The judge found that "though he was obviously and for very good reason upset and filled with remorse, this did not reach the level where his statements should be described as anything but voluntary. He spoke freely and without any compulsion." This finding was supported by the evidence. The courts must indulge every reasonable presumption against waiver of the fundamental constitutional rights embodied in the Miranda warnings. *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938). The Commonwealth must meet a "heavy burden" of proof that a suspect waived those rights. *Commonwealth*

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[d] Mass. Adv. Sh. (1978) 87, 89.

[e] Mass. Adv. Sh. (1978) 2707, 2714-2715.

v. *Dustin*, Mass. , - (1977).[1] *Commonwealth* v. *Hosey*, 368 Mass. 571, 577 (1975). While Look was "upset" about the death of his wife, the Commonwealth has met its burden in this case of showing that Look's emotional condition did not rise to the level at which his waiver was invalid. See *Hosey, supra* at 577 ("extremely emotional . . . detached from reality").

c. Look contends that all of his statements made to Pierce should have been suppressed by virtue of the intercom interception of the conversation by desk officers, and that all statements made to Carr and Masuret were likewise suppressible because they were obtained as a result of the overheard statements. He relies for this contention on G. L. c. 272, § 99, and 18 U.S.C. §§ 2510 et seq. (1976), the State and Federal eavesdropping statutes.

General Laws c. 272, § 99, as appearing in St. 1968, c. 738, § 1, is a comprehensive statute prohibiting almost all forms of warrantless electronic interceptions of oral or wire communications and the disclosure or use of any communication obtained in violation of the statute. The statute defines "intercepting device" as any device "which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication . . . ," and defines "oral communication" as "speech, except such speech as is transmitted over the public air waves by radio or other similar device." *Id.* § 99B 2, 3.

The Federal statute defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2) (1976). Like the State statute, the Federal statute prohibits the disclosure or use of any information obtained through warrantless eavesdropping.[9]

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[1] Mass. Adv. Sh. (1977) 2302, 2306-2307.

[9] Although Congress intended to preempt the field of wiretapping and eavesdropping in enacting 18 U.S.C. §§ 2510 et seq. (1976),

The judge, in ruling on the motion to suppress, did not rule on the legality of the interception, because the Commonwealth had agreed not to present any evidence of the overheard conversations at the trial (and in fact did not present any). He found that Pierce himself had not intercepted any conversation, and that he could testify as a participant in the conversation. He further found that Carr and Masuret had obtained information from Look as a result of regular police procedure, and that therefore any illegality in the interception had no causal connection with their interrogation of Look. Thus he concluded that any "taint" which might have arisen from the interception was "purged" or "attenuated" by the independent interrogation of Look by Carr and Masuret.

Although the judge did not rule on the legality of the desk officers' interception of the Look-Pierce conversation, the parties are not in dispute as to what occurred. Therefore, it is open to this court to pass on the question. Rather than examining the issue in terms of "taint," which assumes illegality of the interception, we prefer to examine the legality of the interception itself.

First, we agree with the judge that Pierce could testify as a participant in the conversation with Look. Pierce had already advised Look of his Miranda rights, including the fact that anything he said could be used against him. Therefore, Look had no reason to believe Pierce would not reveal his statements, and we need not even resort to

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State legislation is permitted as long as it is not less restrictive than the Federal statute. See *Commonwealth* v. *Vitello*, 367 Mass. 224, 246-247 (1975). The Federal statute contains no "intercom exception," but its definition of "oral communication" as pertaining only to situations where the speaker justifiably expects privacy would arguably exclude circumstances where an "intercom" system has been installed. See generally *Vitello, supra* at 231 (both statutes "designed to ensure that unjustified and overly broad intrusions on rights of privacy are avoided;" that is, to protect Fourth Amendment rights).

cases which hold that misplaced confidence by a speaker that a listener will not reveal his words does not protect those statements. See *United States* v. *White,* 401 U.S. 745, 751 (1971); *Hoffa* v. *United States,* 385 U.S. 293, 302 (1966). A participant to a conversation may testify about it, and the fact that unknown to him others were listening when the conversation occurred does not alter this.

Second, the intercom interception by the desk officers was not illegal under either the State or the Federal statute. The former contains an exception for "intercom" systems, installed and used in the ordinary course of business.[10] The judge found that "[t]he reason the Wareham police officers listened to the intercom was because of their concern as to whether the defendant might act in [a] violent manner while he was with Pierce. This was because of the problem that [the police] had had with the defendant previously in the emergency room at the hospital and, further, because he was alone with Pierce in the room with the door closed. (Pierce is an elderly man)." The testimony at the hearing on the motion to suppress reveals no indication that anyone asked the officers why they listened to the conversation, nor did any of them testify about the purpose. The facts found by the judge may fairly be inferred, however, from a letter signed by the three intercepting officers, which was before the judge in support of the motion to suppress.

The judge's findings support the conclusion that the intercom, which obviously was installed for ordinary business purposes, was being used for one of those purposes on the night in question. That the officers failed to inform Pierce they would be listening may have been because it

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[10] "It shall not be a violation of this section . . . (b) for persons to possess an office intercommunications system which is used in the ordinary course of their business or to use such office intercommunication system in the ordinary course of their business." G. L. c. 272, § 99D 1 b.

did not occur to them that Pierce might be in danger until after Look and Pierce entered the room.[10]

As discussed above, the Federal statute requires that a speaker have a justifiable expectation of privacy with regard to "oral communications." 18 U.S.C. § 2510(2) (1976). In determining what is a justified expectation of privacy for purposes of § 2510, we must look to traditional Fourth Amendment law. See *United States* v. *Duncan,* 598 F.2d 839, 847 (4th Cir.), cert. denied, U.S. (1979);[9] *United States* v. *Pui Kan Lam,* 483 F.2d 1202, 1205-1206 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974); *People* v. *Santos,* 26 Cal. App. 3d 397, 402 (1972). As stated above, a person who is talking to a police officer after being told that anything he says may be used against him in court, cannot justifiably claim to have an expectation of privacy as to any statements he makes. *Duncan, supra* at 852. *Santos, supra.* Therefore we think Look's statements do not fall within the definition of "oral communications" of § 2510, and are not subject to the Federal statute.

Because neither the State nor the Federal statute prohibits the interception of the Look-Pierce conversation by the desk officers, we need not consider whether Carr and Masuret, while interrogating Look, put to use any of the information they had obtained from the desk officers.[11]

We conclude that neither the State nor the Federal statute was violated by the action of the desk officers in listening to the conversation, and there was no error in the admission of any of Look's statements.

4. Look's next contention is that there was error in the admission of the shotgun because of a question whether

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[9] 100 S. Ct. 148 (1979).

[11] Masuret testified at the hearing on the motion to suppress that he intended to question Look about the argument with his wife when he entered the interrogation room. Carr testified that they did ask Look about the argument.

the gun was in the same condition as it was on the night of the homicide. He further claims that "there once existed physical evidence [demonstrating] whether the weapon was in need of cleaning at the time of the incident."

We find no merit in either of these contentions. First, the question of the condition of the gun at the trial as compared to the night of the incident is a proper subject for cross-examination, and goes to the weight of the evidence rather than its admissibility. Cf. *Commonwealth* v. *Hogg,* 365 Mass. 290, 294-295 (1974); *Commonwealth* v. *White,* 353 Mass. 409, 419-420 (1967), cert. denied, 391 U.S. 968 (1968). There was testimony that the gun had been marked with a number shortly after the incident, and that it was similarly marked when allowed in evidence. There was considerable testimony about an oil can being found on the table where Look claimed to have been cleaning his gun, and a photograph of the dining room table, with the oil can and the gun on it, was admitted in evidence. There was also testimony that rags were found near the dining room table. The jury had ample evidence to consider in determining whether to believe that Look killed his wife accidentally or intentionally and we find nothing to substantiate Look's claim that exculpatory evidence was lost. See generally *Commonwealth* v. *Boyer,* 355 Mass. 762, 764 (1969).

6. Pursuant to G. L. c. 278, § 33E, as it existed on the date of the defendant's conviction, we have considered the whole case as to both the law and the facts, and we find no reason to change the verdict or to grant the defendant any other relief.[12] For a later amendment to G. L. c. 278, § 33E, see St. 1979, c. 346, § 2, which took effect on July 1, 1979.

*Judgment affirmed.*

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[12] Both Look and the Commonwealth waived an instruction on manslaughter.

## APPENDIX D

**[Judgment]**

COMMONWEATH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH.

AT BOSTON, March 4, 1980.

IN THE CASE No. SJC-1851

COMMONWEALTH

*vs.*

DONALD J. LOOK

pending in the Superior Court for the County of Plymouth

No. 58370

ORDERED, that the following entry be made in the docket; viz., —

*Judgment affirmed.*

BY THE COURT,

/s/ FREDERICK J. QUINLAN
Assistant Clerk

March 4, 1980

See opinion on file.

## APPENDIX E

[MASSACHUSETTS SUPREME JUDICIAL COURT]

March 11, 1980

Melvin S. Louison, Esquire
Louison, Witt & Hensley, P.C.
495 Westgate Drive
Brockton, Massachusetts 02401

RE: COMMONWEALTH v. DONALD J. LOOK
No. SJC-1851

Dear Attorney Louison:

Your request for rehearing in re the above-captioned case has been considered by the court and is denied.

Very truly yours,

S/S Patrick J. Hurley
Clerk

## APPENDIX F

### Selected Provisions of 18 U.S.C. ch. 119

**§ 2510. Definitions**

As used in this chapter—

. . .

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that each communication is not subject to interception under circumstances justifying such expectation;

. . .

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by a investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

. . .

**§ 2511. Interception and disclosure of wire or oral communications prohibited**

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

. . .

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

. . .

**§ 2515. Prohibition of use as evidence of intercepted wire or oral communications**

Whenever any wire or oral communication has been intercepted no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979
No. 79-1774

Supreme Court, U. S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

DONALD J. LOOK,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

# BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979
No. 79-1774

DONALD J. LOOK,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

The respondent is not dissatisfied with the petitioner's statement of jurisdiction and citation to opinion below.

Questions Presented.

1. Whether the Commonwealth's delay of more than four and one-half years in

bringing petitioner to trial deprived him of his right to a speedy trial pursuant to the Sixth and Fourteenth Amendments to the Constitution of the United States?

2. Whether a shotgun was properly admitted into evidence after the delay and resultant change in condition from the time of the shooting?

3. Whether the warrentless interception of petitioner's conversation with a police chief, without the knowledge or consent of either party was an unreasonable search and seizure, and violated 18 U.S.C. §§2510 et seq; and thereby required exclusion from evidence of the fruits, if any, of that surveillance?

## Statutory and Constitutional Provisions Involved.

The relevant provisions are set out in the Petition, p.3 and in Appendix F, pp. 47a-48a.

## Prior Proceedings.

On January 29, 1974, the defendant was arrested for the shooting of his wife, which had occurred in the town of Rochester the previous evening. On May 29, 1974, defendant was indicted by the Plymouth County grand jury for the crime of murder (R. 1-2).

On March 17, 1975, defendant's motion in limine, treated as a motion to suppress, was allowed (R. 2-8, 56). On March 26, 1975, the Commonwealth filed an application under G.L. c. 278, §28E, for leave to

appeal the allowance of defendant's motion in limine (R. 10). On November 2, 1977, the Commonwealth filed a motion to vacate the order of dismissal of the appeal and on November 22, 1977, that motion was denied (R. 10).

On March 27, 1978, the Commonwealth filed a request for a trial assignment (R. 10). On April 5, 1978, defendant filed a motion to dismiss alleging a speedy trial issue (R. 56). On June 15, 1978, defendant filed a motion to continue the case to the September, 1978, term. The motion was allowed (R. 56).

On September 22, 1978, after an evidentiary hearing, defendant's motion to dismiss was denied (R. 9-17).

On October 17, 1978, defendant's motions to suppress I,II and III were denied (R. 19, 27, 35, 57, 58). Defendant's application for review of the denial of said motions pursuant to G.L. c. 278, §28E, was denied by Justice Liacos.

On November 1, 1978, the defendant was convicted of second degree murder, and a motion for stay of execution pending appeal was filed and allowed. The Supreme Judicial Court affirmed the Conviction on March 11, 1980.

Statements of Facts.

On January 28, 1974, at approximately 11 p.m., Donald Look shot his wife, Susan, with a shotgun. Within an hour of the infliction of the wound, Susan Look died

(Tr. 3-15-16). Shortly after the shooting, emergency medical personnel arrived at the Look home (Tr. 3-15). First aid was administered to Susan Look at the residence and she was then transported to a hospital. During the treatment at the Look home, the emergency medical technicians learned from Susan Look that the shooting had followed an argument between Susan and the defendant (Tr. 3-25).

The defendant also went to the hospital where he waited in a room with Chief of Police Walter Pierce. He was orally advised by Chief Pierce of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and signed a sheet provided by Chief Pierce acknowledging his rights (Tr. 3-45).

Shortly after Mrs. Look's death, the defendant was allowed to view the body in the emergency room. At this time defendant became upset and did not wish to leave. At the request of Chief Pierce, defendant was forcibly removed from the room. A struggle resulted in an Officer Sweeney being hit twice by the defendant (Tr. 3-48).

Look was then taken to the Wareham police station and was placed in an interrogation room with Chief Pierce (Tr. 3-4849). While in the interrogation room, defendant made a number of statements to Chief Pierce which were not in response to questions by the chief. He related to Pierce his version of the incident, specifically that the shooting was accidental and occurred while he, Look, was

cleaning his shotgun (Tr. 380-81). Look also informed Pierce that an argument has preceded the shooting (Tr. 1-42-43).

While Chief Pierce and Look were in the interrogation room, and unknown to them, their conversation was, at least in part, overheard on an intercom system by a number of police officers (Tr. 1-87-88). Neither party were aware of or consented to the surveillance (Tr. 1-46). At about 2:30 A.M. on January 29, 1979, Lieutenants Masuret and Carr of the Massachusetts State Police arrived at the Wareham poIice station in the course of their investigation of the shooting of Susan Look. Upon their arrival at the station, Masuret and Carr were told by the police officers at the desk that Look had been

advised by Chief Pierce not to say anything to the State Police. They were also told something about Look having an argument with his wife on the day of the shooting. Prior to arriving at the police station, the State Police representatives had begun their investigation by visiting the Look residence (Tr. 3-157).

Lieutenants Masuret and Carr then conducted an interview with Donald Look. During the course of the interview, which lasted between one and a half and two hours, the State Police officers were alone with Look in the interrogation room. The interrogation began with Lieutenant Masuret informing Look of his rights under Miranda. Look acknowledged the rights and informed the State Police officers that he

had previously been advised of his rights by Chief Pierce and another police officer (Tr. 68, 113). About halfway through the interview, Lt. Masuret repeated the Miranda warnings to the defendant.

In response to questioning by the State Police officers, the defendant related his version of the incident. He stated that he arrived home, bringing some food, after going to the store. He stated that, during the evening, he had three or four beers and that his wife also had a couple. He said that they watched television and that at the beginning of a program called "Medical Center" he decided to leave the room and clean a shotgun which he wished to use for hunting. He related that while cleaning the gun it discharged

accidentally, wounding his wife (Tr. 3-160-164).

During the interview, Lt. Masuret asked Look if he had an argument with his wife and said he had had a minor argument (Tr. 3-110, 4-37).

At the conclusion of the interview, Look was booked on the charge of murder.

From January 29, 1974, to March 25, 1975, the disposition of this case proceeded in the usual course. A probable cause hearing was held, an indictment was returned, appearance of counsel was filed, a plea was entered, various discovery motions were filed and allowed by agreement and a hearing was held on defendant's motion to suppress various incriminating declarations made by the victim (R.

54-56). Following the allowance of the suppression motion, the Commonwealth petitioned for review under G.L. c. 278, §28E. This appeal was not prosecuted, which resulted in its dismissal on November 22, 1975. A motion to vacate the dismissal of the appeal was denied on November 22, 1977 (R. 10).

On March 27, 1978, the Commonwealth requested a trial assignment and on April 5, 1978, the defendant for the first time asserted a speedy trial demand in the form of a motion to dismiss the indictment (R. 10, 56). From March, 1978, to October, 1978, various defense motions were filed and denied and the case proceeded to trial from October 19, 1978, to November 1, 1978 (R. 56-58).

At trial the defense was essentially one of accident. The defendant testified, generally reiterating his earlier story that his shotgun discharged while he was cleaning it, wounding his wife. The defendant asserted that a good marital relationship existed between himself and the deceased. He acknowledged that shortly before the shooting he and his wife had had a disagreement concerning the adoption of a Vietnamese child, during which the defendant questioned the deceased concerning whether she had given birth to a child before their marriage. The defendant also presented testimony of a number of persons regarding their observations of a good marital relationship between the defendant and the deceased.

The Commonwealth introduced the testimony of one Paul Dockham establishing Susan Look's desire for a divorce and her dissatisfication with the property arrangements between herself and her husband.

Vivian Ivers, the deceased's stepmother, testified concerning a phone call she received from the deceased immediately before the shooting. Ivers indicated that Susan Look was upset concerning her husband's accusation that she had given birth prior to her marriage to the defendant and evidenced an intention to leave her husband (Tr. 6-16).

At the close of the testimony, the jury returned a verdict of second degree murder (R. 58).

## Argument.

### I. The Petitioner Was Not Denied His Right to a Speedy Trial.

#### A. The Failure of the Supreme Judicial Court to Court the Period Between Arrest and Indictment is not Ground for Summary Reversal.

Whether the Court below measured the length of delay from the time of arrest (Dillingham v. United States, 423 U.S. 64 (1975), or the time of indictment (United States v. Marion, 404 U.S. 307 (1971) is not controlling, for the court found that the length of delay was sufficient to "trigger" further inquiry into whether petitioner was denied his constitutional right to a speedy trial. While Dillingham[1/] does require that post-arrest

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[1/] A review of Petitioners Brief in the Court below indicates that no reference was made to Dillingham.

pre-indictment delay be considered petitioner was in no manner prejudiced in the instant case. The Supreme Judicial Court found that the delay triggered the test of Barker v. Wingo, 407 U.S. 514 and "it should be weighed quite heavily against the Commonwealth" (footnote omitted) Commonwealth v. Look, (App. C., 29a.) Given that no absolute time period beyond which a delay may not occur exists, the precise length of the delay here could not accure to the petitioner's benefit any more than it did.

B. The Decision of the Court Below is Consistent with the Balancing Approach Enunciated in Barker v. Wingo, 407 U.S. 514 (1972).

The petitioner apparently argues only that the court abused it discretion and

misapplied Barker v. Wingo in imposing upon petitioner the burden of proving prejudice. However, the petitioner does not argue that there exists or should exist a rule shifting the burden of proof or to alter the balancing approach of Barker v. Wingo (Petition, 14). It is difficult to discern what, if any question then, petitioner attempts to raise which is of sufficient substantiality and broad import to justify this courts consideration.

1. The Supreme Judicial Court Applied the Correct Test.

There was neither a mechanical imposition of a "high" burden of proof on petitioner to demonstrate prejudice, nor did the court require that the petitioner make an affirmative demonstration of prejudice as a necessary and sufficient

condition for demonstrating denial of the right of speedy trial. Contrast, Moore v. Arizona, 414 U.S. 25, 26 (1973). Review of the decision below reflects the court's awareness that flexibility and balancing of the factors identified in Barker v. Wingo is the appropriate approach. The court approached the issue stating "The analysis of this claim necessitates a balancing of four factors..." In considering first, the length of delay, the court not only found it to be "unquestionably sufficient to 'trigger further inquiry," but was "...clearly to be weighed against the Commonwealth, absent an adequate explanation for that delay." (App. C., p. 27a.). Finding that the delay resulted solely from negligence on the part of the

Commonwealth, the court reasoned that the delay, even in the absence of any calculated attempt to frustrate the defense, to be a factor to be "weighed quite heavily against the Commonwealth" (footnote omitted) App. C., 29a. The court then noted that the petitioner waited nearly four years before asserting his right to a prompt trial, and, then, only did so five months after the Commonwealth filed a motion to vacate the dismissal of its interlocutory appeal, and determined that "[t]his inaction on his part must be weighed heavily against him" (App. C, p. 30a).

As to the question of prejudice, the petitioner's allegations are speculative and insubstantial. The expected testimony

of the unavailable witness while relevant to his marital relationship would have been merely cumulative of several witnesses who did testify. The court also considered the failure of memory of witnesses and possible 'anxiety and concern" and found no support for either claim. Finally, petitioner's claim of prejudice as the admission of the shotgun was considered in the context then presented,[2/] in without merit. This

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2/The stated ground for objection to the introduction of the shotgun was:

> "MR. LOUISON: My ground, your Honor, as to the condition of the gun, whether it has been cleaned or changed in any way from the time he found it. I think the temptation is to assume that -- let me say this, if it doesn't go into the jury room I would have no objection, but if it's going to be given into the hands of the jury, then I say the question of how it was at

evidentiary matter was appropriate for cross-examination and, as was found, goes to "the weight of the evidence rather than its admissibility" (App. C, 41a).

The court then, balancing all four factors, held that the lengthy delay and lack of reasons therefore balanced against the failure of the defendant to assert his right in addition to his failure to demonstrate prejudice, "tip the scales against him" (App. C, 33a). The court

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Footnote Continued

> the time and how it is now and what has been done with it in the interim becomes relevant before it becomes an actualy exhibit to go into the hands of the jurors.
>
> THE COURT: Objection overruled. It may be marked as an exhibit.
>
> MR. LOUISON: Exception." (Tr. 4-94).

clearly maintained the flexibility of approach required by Barker.

2. The Decision Below is not in Significant Conflict with Decisions of the Federal Courts of Appeals.

The general rule in the federal courts is to require some showing of prejudice by the defendant despite excessive delays. United States v. Saglimbene, 471 F.2d 16, 17 (2nd Cir. 1972) (six years); United States v. Dreyer, 533 F.2d 112, 116 (3rd Cir. 1976); Morrison v. Jones, 565 F.2d 727, 723-724 (4th Cir. 1977); United States v. Enright, 579 F.2d 980, 990 (6th Cir. 1978); United States ex rel. Little v. Twomey, 477 F.2d 767 (7th Cir. 1973). In the First Circuit the rule is that prejudice may not be presumed from the mere

passage of time. United States v. DeLeo, 422 F.2d 487, 494 (1st Cir. 1970).

The burden to show lack of prejudice shifts to the government only when the government's delay is not only lengthy but is purposeful in the sense of a deliberate delay to gain tactical advantage. Murray v. Wainwright, 450 F.2d 465 (5th Cir. 1971), or, prejudice becomes irrelevant where a combination of unexcused delay in face of demands for a trial weighs heavily in favor of the accused. Hoskins v. Wainwright, 485 F.2d 1186 (5th Cir. 1973). See Prince v. Alabama, 507 F.2d 693 (5th Cir. 1975). In the instant case there was no purposeful delay nor did petitioner assert his rights. There is no conflict.

The Commonwealth respectfully suggests that petitioner fails to bring before this court any substantial federal question; he demonstrates no deviation from any constitutionally compelled consideration in the assessment by the lower court of his speedy trial claim; he asks only that this court substitute its own assessement of the factors appropriately considered by the Supreme Judicial Court.

II. Electronic Surveillance.

The court below found no violation of either state or federal law by reason of certain police officiers, who did not testify, overhearing by means of an office intercom the petitioner's conversation with the Chief of Police. First, there can be no dispute that the Chief, as a participant

in the conversation, could testify. The petitioner had been advised of his Miranda rights. Second, Officers Carr and Masuret came upon knowledge of the argument through an independent source. The report of Lt. Masuret reveals that Look was questioned on the basis of the statements of the victim to the Emergency Medical Technician

> "Bnner [sic] stated that he talked with the victim and she called him by name. She then said, 'Donald shot me.' Donald stated that it was an accident, however she retorted, 'We had an arguement - He did it on purpose.' She repeated this several times to Bnner. This statement was made in the presence of Look. Look was questioned at the police station as to why she would say something like this and he stated that he couldn't imagine why she would say

> such a thing and kept insisting that it was an accident. (Ex. 21, Tr. 5-131).

Thus it cannot be said that the structure of th interrogation of Look was formed by an exploitation of an illegality.

Finally, there was no initial illegality. The Commonwealth submits that the reasoning of the Supreme Judicial Court is correct.

> "...the Federal statute requires that a speaker have a justifiable expectation of privacy with regard to "oral communications." 18 U.S.C. §2510(2) (1976). In determining what is a justified expectation of privacy for purposes of §2510, we must look to traditional Fourth Amendment law. See United States v. Duncan, 598 F.2d 839, 847 (4th Cir.), cert. denied, U.S. (1979); United States v. Pui Kan Lam, 483 F.2d 1202,

> 1205-1206 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974); People v. Santos, 26 Cal. App. 3d 397, 402 (1972). As stated above, a person who is talking to a police officer after being told that anything he says may be used against him in court, cannot justifiably claim to have an expectation of privacy as to any statements he makes. Duncan, supra at 852. Santos, supra. Therefore we think Look's statements do not fall within the definition of "oral communications" of §2510, and are not subject to the Federal statute." (App. C, 40a).

Conclusion.

For the reasons stated above, the Commonwealth submits that the petition does not present a substantial constitutional question justifying the grant of a writ of certiorari. The petition should be denied.

Respectfully submitted,
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No. 79-1774

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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DONALD J. LOOK, *Petitioner,*

v.

COMMONWEALTH OF MASSACHUSETTS, *Respondent.*

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**On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts**

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## REPLY BRIEF FOR PETITIONER

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**On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts**

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## REPLY BRIEF FOR PETITIONER

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### I. PREJUDICE

The Brief in Opposition contains gross improprieties which are especially harmful in a case such as this, where the basic question is whether the conviction of the defendant below was obtained at a trial which was adequately free of prejudicial factors. The Commonwealth in its Brief notes and relies on testimony which was held inadmissible at trial, and also on a police report which was never introduced as substantive evidence at the trial. It is hard to understand the purpose of this except as an effort to prejudice this Court's consideration of the case.

First, at page 6 of the Brief in Opposition, the Commonwealth states as fact for the Court's consideration the following:

> During the treatment at the Look home, the emergency medical technicians learned from Susan

> Look that the shooting had followed an argument between Susan and the defendant (Tr. 3-25).

This is an egregious use of testimony which was excluded from evidence in this case. The medical technician's testimony was part of a *voir dire* hearing appearing in the transcript at vol. 3, pp. 22-35. The trial judge's ruling to exclude that testimony is unequivocally set forth at vol. 3, p. 35.

Then, at pages 25-26 of the Brief in Opposition, the Commonwealth quotes at length from a police report, evidently in a renewed attempt to influence this Court improperly. This police report was never in evidence in the court below. The quoted portion of the police report indicates that at some undisclosed time, the state police officers were informed by one of the medical technicians of an alleged argument between the petitioner and his wife. That report was submitted by defense counsel, but only for *voir dire* purposes and on a question of admissibility of evidence totally unrelated to the quoted excerpt from the report;[1] and it was marked by the trial court as "Voire [sic] Dire Exhibit No. 21" (Tr. vol. 5, p. 131). The contents of the police report were never submitted as evidence at the trial, and were never before the jury for its consideration.

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[1] The *voir dire* during which this police report was submitted concerned whether testimony by decedent's step-mother as to certain telephone conversations should be excluded because defense counsel had not been timely advised by the Commonwealth of the content of her proposed testimony. (Tr. vol. 5, pp. 112-131.) Defense counsel asked that the police report be marked only "as a voir dire exhibit as part of . . . [his] exception" to the trial court's ruling to admit certain parts of the step-mother's testimony. (Tr. vol. 5, p. 130).

Despite these two specious assertions of fact made by the Commonwealth in its Brief in Opposition, there is no evidence in the record whatsoever suggesting that Officers Carr and Masuret (who prepared the police report) spoke to the medical technician concerning the decedent's statement *prior* to entering the interrogation room at Wareham Police Station. (Tr. vol. 1, pp. 57-78, 112-141; vol. 3, pp. 106-156, 156-171; vol. 4, pp. 3-45; vol. 6, pp. 37-41.) There is not one iota of evidence to support the Commonwealth's baseless allegation that the state police officers had an independent untainted source for the "argument" information revealed to them through the surreptitious surveillance of petitioner's conversation with the Rochester police chief at the Wareham Police Station.

## II. DENIAL OF A SPEEDY TRIAL

A. The Commonwealth contends that the failure of the court below to count the four-month period between petitioner's arrest and indictment as part of the delay relevant to petitioner's speedy trial claim, while in conflict with *Dillingham* v. *United States,* 423 U.S. 64, should be ignored. (Br. 15-16.) The reason offered is that the court found the post-indictment delay sufficient to "trigger" further inquiry, and weighed that delay "heavily" against the Commonwealth. This is unpersuasive in the face of the undoubted failure of the court below to apply this Court's decision in *Dillingham.* (Pet. App. C, 27a.)

As developed in the Petition, triggering further inquiry is but one function of length of delay under *Barker* v. *Wingo,* 407 U.S. 514. (Pet. 11.) *Dillingham* nowhere suggests that pre-indictment delay serves only a triggering role. Moreover, that the court below

may have deemed the post-indictment delay to weigh "heavily" in petitioner's favor does not mean, as the Commonwealth suggests, that proper consideration by the court of the four-month additional delay could not have made the delay "accure [sic] to the petitioner's benefit any more than it did." (Br. 16.) Under *Barker's* flexible *ad hoc* balancing test, the longer the delay the *more* heavily it is counted against the government. Thus, the length of delay in this case should have been weighed against the Commonwealth more severely than it was. Particularly in a speedy trial case as strong as this one—involving a four and one-half year delay and specific claims of serious prejudicial effects—it cannot reasonably be said with assurance that consideration of the additional four-month delay would not have tipped the scales in petitioner's favor.

B. The Commonwealth fails to meet petitioner's argument that the court below misapplied *Barker* v. *Wingo*. Rather, it says that petitioner "apparently" argues that the court below erred in imposing on him "the burden of proving prejudice." On this basis it contends that since petitioner does not argue for a shifting of burden of proof or an altering of *Barker* v. *Wingo's* balancing test, it is somehow "difficult to discern" petitioner's claim. (Br. 16-17.)

Petitioner's position, spelled out at pages 9-16 of the Petition, is quite clear, and more carefully honed. Petitioner's argument relates primarily not to who has the burden of proof regarding prejudice, but rather to what degree of proof is needed to meet that burden, how the length of the delay affects the degree of required proof or who bears the burden, and in what manner and to what extent the length of delay

may serve as presumptive evidence of prejudice. Petitioner contends that the utter failure of the court below to view the length of the delay as having any impact on the issue of prejudice was inconsistent with *Barker* v. *Wingo*. The petitioner further points out that these issues involving the interaction of the length of delay and the issue of prejudice are considerably unsettled, making this case appropriate for review by this Court.

C. The Commonwealth characterizes petitioner's allegations of prejudice from the four and one-half year delay as "speculative and insubstantial." (Br. 19.) This wholly ignores the fact that the delay caused the unavailability of petitioner's key witness on the quality of his marital relationship with the decedent, a subject which bore directly upon the main issue at trial: petitioner's motive.[2] It is insufficient to dismiss this claim of prejudice with a cavalier and unsubstantiated conclusion that the missing witness's testimony would have been merely cumulative. Similarly, petitioner's claim of prejudice due to failed memories as to the condition of the shotgun cannot be dismissed as readily as the Commonwealth would argue.

*Barker* v. *Wingo* makes clear not only that a delay may be "presumptively prejudicial," but that the "most serious" form of prejudice caused by delay is "the possibility that the defense will be impaired." 407 U.S. at 530, 532. *Barker* noted in particular the danger of prejudice due to witnesses becoming un-

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[2] This is starkly emphasized by the Commonwealth's improper use of excluded and non-admitted testimony to which reference is made at the beginning of this Brief.

available or losing memory. This Court said (407 U.S. at 532):

> If witnesses die or disappear during a delay, the prejudice *is obvious*. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record *because what has been forgotten can rarely be shown.* [Emphasis supplied.] [3]

Under *Barker*, petitioner's claims of witness unavailability and memory loss deserve more careful consideration than the Commonwealth suggests.

D. The Commonwealth's citations of authority at pages 22-23 of its Brief in Opposition are particularly unsuccessful in meeting petitioner's contentions. Thus, as authority for the proposition that the mere passage of time does not give rise to a presumption of prejudice, the Commonwealth cites only *United States* v. *DeLeo*, 422 F.2d 487, 494 (1st Cir. 1970), a case decided two years before this Court stated in *Barker* v. *Wingo* that delay alone could be "presumptively prejudicial." 407 U.S. at 530. All of the other cases cited are likewise readily distinguishable.

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[3] The Massachusetts court's reluctance to accept *Barker* on this point is apparent when the decision below is read in conjunction with *Commonwealth* v. *Rodriguez*, Mass. Adv. Sh. (1980) 1223, decided May 13, 1980. Although the court upheld in that case a dismissal for denial of a speedy trial, it stated its *unwillingness* to accept the finding of the trial court there that " 'lapse of time has probably dimmed the memory of witnesses who might be favorable to the defendant as well as the memory of prosecution witnesses concerning details that might be elicited on cross-examination which might be favorable to the defendant.' " Mass. Adv. Sh. (1980) at 1229.

## III. ILLEGAL ELECTRONIC SURVEILLANCE

Since the petition was filed in this case, this Court has decided the case of *United States* v. *Henry,* No. 79-121, decided June 16, 1980. The *Henry* case involves elements which are relevant here, under the Sixth Amendment, as well as under the Fourth and Fifth Amendments. In considering the *Henry* case here, two facts must be recognized.

1. No question was raised below with respect to the Sixth Amendment. But, in this area of surreptitious interception of conversations, the questions under the Fourth, Fifth and Sixth Amendments are so closely interrelated that a question, squarely raised, about the propriety of an interception should be considered by this Court under any of the possibly applicable constitutional provisions. This is high-lighted by the fact that the reasoning used by the Court in the *Henry* case is applicable almost step by step to the facts of this case, as will be indicated below.

2. In *Henry* (and in *Spano* v. *New York,* 360 U.S. 315, and *Massiah* v. *United States,* 377 U.S. 201), the defendant had been indicted at the time the relevant facts occurred. Here, the petitioner had not been indicted when his conversation was intercepted. But he was under arrest. And the police investigation, under the circumstances "was no longer a general inquiry into an unsolved crime, but ha[d] begun to focus on a particular subject." *Escobedo* v. *Illinois,* 378 U.S. 478, 490. Here, of course, Look was always the only subject. He was the sole possible target in the case.

All of the reasoning applied by this Court in *Escobedo, Spano* and *Massiah* is equally applicable here. And the parallel between this case and *Henry* remains very close. In both *Spano* and *Massiah,* the accused had counsel at the time the police surveillance oc-

curred. Here, the accused did not have counsel at that time, but the *Henry* decision shows that this is not essential to the application of the Sixth Amendment guarantee of right to counsel.

The petitioner's conversation here, which was surreptitiously overheard, was with a police officer—as in *Spano*. Here, as in *Spano,* that officer was not the officer in charge of the case, and he was a long-time friend. As the trial judge found (Pet. 13a), Chief Pierce said to the petitioner: "I have known you all my life"; and he repeated this statement. The whole account shows that Chief Pierce was acting as a friend at a time of crisis in the petitioner's life. And neither the petitioner nor Chief Pierce was aware that their conversation was being surreptitiously overheard by the police officers at the desk.

There is much in *Henry* which fits into this picture. Thus, the Court said in *Henry* (slip op., p. 5);

> The present case involves incriminating statements made by the accused to an undisclosed and undercover government informant while in custody and after indictment.

Here the accused was in custody, though not yet indicted. His statements were surreptitiously made known to undisclosed police officers, and it is this undisclosed electronic disclosure which made the information available to the police, not anything said by Chief Pierce. In *Henry,* as in *Massiah,* the police officers obtained and utilized information from the petitioner without his knowledge that his words were being communicated to them as he spoke.

Here the "listening post" was "an inanimate electronic device" (*Henry,* slip. op., p. 7, fn. 9), but the presence of Chief Pierce, though he was unaware of

the electronic surveillance, did provide "capability of leading the conversation into any particular subject or building any particular replies." Here, "the government has interfered with the right to counsel of the accused by 'deliberately eliciting' incriminating statements" (*Henry*, slip op., p. 8), though subtly and by indirection, by listening in on the conversation between Pierce and Look. In *Henry*, it was "undisputed that Henry was unaware of Nichols' role as a government informant." (Slip op., p. 8.) In the present case, it is undisputed that both Pierce and Look were unaware that their conversation was being overheard, and that they were providing information to the police officers.

Look knew that he was speaking to a police officer, and he took his chances on that; but he did not know that what he was saying was being heard by the officers at the desk. As the Court said in *Henry*, "Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be government agents." (*Henry*, slip op., p. 9.) In *Henry*, this Court said (slip op., p. 9): "Henry, being unaware that Nichols was a government agent expressly commissioned to secure evidence *cannot be held to have waived his right to the assistance of counsel.*" (Emphasis added.) Here, Look was unaware that his conversation with Pierce was being electronically communicated to the police officers at the desk. In this situation, he cannot be held to have waived his right to the assistance of counsel.

Finally, as in *Henry*, Look's "incarceration at the time he was engaged in conversation," with Pierce "is also a relevant factor." (Slip op., p. 9.) In *Henry*, this Court referred to the passage in *Miranda* which deals with "the powerful psychological inducement to reach for aid when a person is in confinement." (Slip

op., p. 10.) Here, Look was in custody and he was clearly particularly susceptible to the invasion of his privacy through the undisclosed electronic device. As this Court said in *Henry* (slip op., p. 10): "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the government violated Henry's Sixth Amendment right to counsel."

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The Brief in Opposition (p. 25) could be read to suggest that petitioner was advised of his rights under *Miranda* v. *Arizona,* 384 U.S. 436, during his conversation with Mr. Pierce. That is not so. Petitioner was advised of his *Miranda* rights while at the hospital (Tr. vol. 3, p. 45), before he was moved to the Wareham Police Station. Petitioner was not advised of his *Miranda* rights during the approximately two and three-quarters hours he spent in a separate room at the police station, the first hour of which was spent alone with Mr. Pierce. (R. 37-38; Tr. vol. 1, p. 51; vol. 3, pp. 44-76.) Thereafter, at approximately 2:40 a.m., the state police officers began their interrogation of the defendant and informed him of his *Miranda* rights at that time (R. 39). However, by that time, petitioner's conversation with Mr. Pierce had already been intercepted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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